

JUDICIAL REVIEW IN LATIN AMERICA

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Judicial review of the constitutionality of legislation is only a minor part of the governmental structure in most of the Latin American countries, but its importance has been steadily growing.

Judicial review or "jurisdictional control," as it is usually styled, has assumed a variety of forms, encountering obstacles in realization, evidencing increasing, if intermittent, realization of democratic ideals, introducing innovations worthy of serious investigation for adaptation in other countries. A vast volume of law has been developed with which it is impossible to deal in a short paper. Only flashlights will be here attempted, in an endeavor to stimulate interest and research. I have made little effort to keep up to the minute. Generalizations must perforce be pardoned, notwithstanding that we are dealing with a score of countries differing in geographical, historical, ethnical, economic and social factors, despite the existence of superficial resemblances and a common legal colonial background.¹ The progress, or lack of progress, of judicial review can be understood only in the light of the infinitely complex background with which it is confronted. Some countries have been well governed over long periods of time. A few have displayed an almost uninterrupted record of anarchy, corruption, or malevolent dictatorship and a disregard of the rule of law.

The colonial background of the Spanish American republics did not prepare them for self-government on a national scale. At first, the colonies were treated as an appanage, the personal property of the Crown. Spain was abandoning democratic government to become an absolute monarchy. The voices of the theological jurists that the King was subject to the law were raised in vain.² It had not always been so. Spain, especially in the Kingdom of Aragon, had attained parliamentary government and a respect for individual freedom before England. The Justiciar or chief justice of Aragon, had power to annul the unconstitutional acts of the King and to protect the liberty of the individual and his property rights against the unlawful acts of the King's officials.³ But in Castille, there was no judicial officer

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¹ Brazil, Haiti and Santo Domingo excepted.

² Natural Law was considered of a higher hierarchy than positive law. The Partidas proclaimed "Against natural law no privilege or Charter of Emperor, King or other lord, . . . should be valid" (Part. 3, tit. 18, L. 31).

³ 2 Hallam, *View of the State of Europe During the Middle Ages*, Ch. IV (N.Y. ed. 1863); 1 Prescott, *Ferdinand & Isabella*, Introd. sect. II, 58-103 (1838); 1 Linares Quintana, 35 *seq.*, 5 *id.* 342 *seq.* Reference is made to two modern works (not seen),

vested with the prestige and power of the Justiciar of Aragon, and it was the law of Castille that was made the law for the colonies. The powers of the King, represented by the Viceroy (or Captain General in the less important provinces) were absolute, tempered only by the autonomy of the municipal councils or *ayuntamientos* and by an underlying respect for law or at least for legal formalities. It was in the local *ayuntamientos* or *cabildos* that the declarations of independence first rang out and where the earliest constitutions were drafted.

These early constitutions, ephemeral and for the most part never actually in force, due to the war for independence, are nevertheless of historical importance. They furnished the basis or the pattern for the later constitutions. The idealists who drafted them, without experience of government, in revolt against Spanish political institutions, naturally turned to foreign sources. The bills of rights, or individual guarantees, were copied from the French Declaration of the Rights of Man and of the Citizen⁴—the federal and the presidential systems were taken from the United States. The United States Constitution offered a seductive mirage to the inexperienced Latin American republics. It was the text only of the United States Constitution, not the practice under it, that was known to these early founding fathers, and in the bare text of our constitution, there is no express provision for judicial review. The Spanish law remained in force and the practices of the courts and the modes of Spanish legal thinking continued with little change until the adoption of their own codes modeled on the Codes Napoleon, later in the 19th century.

It is difficult to assign priority for the introduction of judicial review. As far as my research discloses, priority, at least on paper, must be assigned to the State Constitution of Yucatan, Mexico, of 1841, which introduced the *amparo* for the protection of individual rights. The draftsman Rejon, and later Otero, were influenced by de Tocqueville, to whom the Latin Americans were indebted for their first knowledge of the working of our system.⁵ Haiti's constitution of 1843 (art. 162) provided judicial review. Bolivia's constitution of

La Sala, Examen Historico Foral de la Constitucion Aragonesa, 2 v. Madrid, 1868; Lopez de Haro, Carlos, La Constitucion y Libertades de Aragon. Madrid, 1926. John Dickinson in the Constitutional Convention of 1787 alluded to the Justiciary of Aragon which through the power to set aside the laws "became by degrees the law-giver." Deener, "Judicial Review in Modern Political Systems," 46 Am. Pol. Sci. Rev. 1079, 1080 (1952).

⁴ Nariño published a translation in Bogotá in 1793. A translation published in Guadalupe circulated in Venezuela in 1797; another was published in Caracas in 1811.

⁵ A translation was published by Sánchez de Bustamante in 1837. La Democracia en la America Del Norte; others by Leopoldo Borda, Paris, 1842, and L. Roa de Brandaris, Madrid, 1843. There have been numerous later translations or editions.

1851 was the first in Spanish America to expressly provide for judicial review—the courts were to apply the constitution in preference to the laws (art. 82) and the 1861 constitution (art. 65(2)) vested in the Supreme Court the power to “hear in sole instance matters of pure law, the decision of which depends on the constitutionality or unconstitutionality of laws, decrees or resolutions of any kind,”⁶ but it is not clear when use was first made of this power.

It was taken for granted under the 1853 Constitution of Argentina, the Latin American constitution that most closely followed that of the United States, that the United States practice would be followed. This constitution did not become effective until it was adhered to, with amendments, by the province of Buenos Aires in 1860; the Judiciary Act was passed in 1863; the Supreme Court was organized and the first decisions upholding this judicial power were rendered in that year.

Other countries followed by incorporating judicial review in one form or another in their constitutions: Venezuela 1858, 1893; Colombia 1886, 1910; El Salvador 1886; Costa Rica 1871, 1917; Brazil 1891; Nicaragua 1893; the United States of Central America 1898; Cuba 1901; Panama and Honduras 1904; Guatemala 1921; Chile 1925; Uruguay 1934.

There are earlier instances than those we have cited, in the constitutions, of an express or implied power of judicial review, but they do not seem to have been acted on.⁷

POWER EXPRESSLY OR IMPLIEDLY DENIED

The power to interpret the constitution was expressly vested in the Legislature in the early constitutions of Colombia—1821 (art. 189—the then Colombia included Venezuela and Ecuador). 1830 (art. 189), 1832 (art. 213), 1843 (art. 169), 1853 (art. 57); of Chile, 1833 (art. 164); and in all the constitutions of Ecuador from 1835 on; Mexico 1824 (art. 165); Uruguay 1830 (art. 152) and 1918 (art. 156); Venezuela 1830 (art. 224).

The exclusive power to interpret the laws authoritatively (and hence by implication to interpret the constitution) was expressly

⁶ A provision that has been followed in all subsequent constitutions; in the 1945 constitution it is contained in art. 143, par. 5.

⁷ Venezuela 1811 (ch. 4, sec. 2; art. 2, ch. 9); the Constitutional Bases of the Central American Federation (1823, art. 188(1)) Decree No. 76 (1839) of Guatemala's Declaration of the Rights of the State and of its Inhabitants (art. 11); Costa Rica 1821, art. 41; 1825, art. 8; 1844, art. 5; 1859, art. 11; Ecuador 1845, art. 39 (eliminated in later constitutions); Dominican Republic 1844; Nicaragua 1838, art. 37 (which contains the germ of the “popular” action) and art. 45; 1854, arts. 79, 89; Peru 1856, art. 10.

vested in the Legislature by the Cadiz Constitution of 1812 (art. 131), Brazil (1824, art. 15(8)), several constitutions of Guatemala or amendments thereto (1825, art. 94(1)); 1879 (art. 54(1)), 1921 (art. 54(1));⁸ Peru 1856 (art. 55), 1860 (art. 59), 1920; Nicaragua 1826 (art. 81(1)); and later constitutions; by early constitutions in Colombia; Tunja 1811 (sec. 1, Ch. 3, art. 10); Cundinamarca 1812 (tit. IV, art. 30); Cartagena 1812 (tit. VI, art. 15); Antioquia 1815 (tit. 3, art. 10); Paraguay 1870 (art. 163); Uruguay 1830 (art. 152) and 1918 (art. 156); Haiti, 1946 (art. 78).

The Ecuador Constitution of 1906 (art. 7) categorically states that only the Congress can declare whether a law or legislative decree is constitutional or not. The Judiciary Law of 1922 makes it an attribute of the Supreme Court to resolve the doubts of the superior courts as to the meaning of any law with the duty to submit such doubts to the Congress.⁹

The Colombian Constitution of 1886 gave no power of judicial review of enacted statutes. Its chief draftsman, Caro, echoing Rousseau,¹⁰ expressed the opinion that it was improbable, nay impossible, that the Legislature should pass an unconstitutional statute.

The express denial of judicial review stems from the French Constitution of 1791 (Title 3, Ch. 5, art. 3) and the Cadiz Constitution of 1812 (art. 246), which prohibited the courts from suspending the execution of the laws.¹¹

This power of Congress to interpret the constitution and the laws harmonizes with the spirit of French law. Hostility to judicial legislation was a reaction of the revolution against former practices and was embodied in article 5 of the Napoleonic Civil Code which forbids judges when giving judgment to lay down general principles or rules of conduct, a provision to be found in several of the Latin American codes. More important perhaps, it harmonized with the thought processes of Latin American lawyers—during the colonial period, only the King could enact and authoritatively interpret¹² the

⁸ Adding the proviso "but without violating the constitution."

⁹ Somewhat analogous provisions as to consulting Congress were to be found in the Mexican Constitution of 1835-1836 (Ch. 5, art. 12(XV)), the Dominican Constitution of 1844. In Haiti, provision is made, without prejudice however to vested rights, for an interpretation of the constitution or laws by the Legislative Chambers either spontaneously or at the request of either of the parties engaged in a pending case (1946, art. 111). The Tunja (Colombia) Constitution of 1811 provided "The Executive and Judicial Powers must abide by the letter of the law and in case of doubt must consult the Legislature (Ch. 4, art. 4).

¹⁰ "One need not ask . . . if the law can be unjust, since no one is unjust to himself." Du Contract Social, Livre II, Ch. VI.

¹¹ Reproduced in Maximilian's Provisional Statute for the Mexican Empire (1865).

¹² Even prior to the colonial era the right of the King to interpret the laws was elaborately expounded in the Ordenamiento de Alcalá de Henares (1386) tit. 28.

laws as the authority of the Cortes or Parliament had ebbed to the vanishing point.

But all the constitutions recognized the supremacy of the constitution. Its guardianship was left not to the courts, but again under the influence of the Rousseau doctrines and the French constitutions, either to the Legislature or to a permanent committee of the Legislature or to a senate, which might be either a branch of the legislature or a separate body. The idea was not alien to our own early thought.¹³

We may note a few instances of this attempt at legislative guardianship of the constitution. Joseph Bonaparte's Constitution of Bayonne for Spain (1808) provided (art. 39) that the Senate should watch over the preservation of individual liberty and freedom of the press. The Cadiz Constitution of 1812, in force in several of the colonies, provided for a permanent Committee of the Parliament (Cortes)¹⁴ one of whose functions was to watch over the observance of the constitution and the laws and to report any violations to the next session of the Cortes (art. 160(1)).

The Brazilian Constitution of 1824 made the General Assembly the guardian of the constitution.

Antedating the Cadiz Constitution, Colombia's first constitution, that of Cundinamarca in 1811, provided for a Senate composed of the Vice-President and four other members "of censure and protection to sustain the Constitution and the rights of the people." It was the highest court and its primary duty was to watch exact compliance with the constitution and prevent violation of the inprescriptible rights of the people. It could act either on its own initiative or upon complaint of any citizen. This latter provision is a precedent for Colombia's present-day "popular action." It included special

¹³ The Councils of Censorship and Revision in New York (1777-1821) and Illinois (1818-1847) proved of some effect in enforcing constitutional limitations; not so the Council of Censors in Pennsylvania (1776, arts. 46, 47) and Vermont (1777-1869, s. 44). Meader, *The Council of Censors* (Providence, 1899). The Senate, together with judges, in New York until 1846 and in New Jersey until 1946 was the court of ultimate appeal. Under the New Jersey Constitution of 1776, the Governor and Council constituted the court of last resort.

¹⁴ The Permanent Committee is deeprooted in Spanish history; it dates from the 12th century in Aragon, was copied in other Spanish Kingdoms and reproduced, in addition to the Cadiz Constitution, in early constitutions of Argentina, Uruguay, Chile, Peru and Venezuela, and is to be found today in Panama, Guatemala, Haiti, Uruguay, Mexico. TENA 384-388 (4th ed.). Tena is often critical of the Mexican system. The only fault I have to find with his excellent work is that he has taken as gospel truth some questionable assertions of Corwin whose book has been translated into Spanish as "*La Constitución Norteamericana y su Actual Significado*," Buenos Aires, 1942, and of some continental writers whose knowledge of our system is often superficial or out of date.

provisions as to the veto power on the ground of unconstitutionality. This also is a precedent for provisions in the 1886 constitution.

The 1825 Constitution of Costa Rica vested in the Congress exclusively the attribute to watch over the Federal and Costa Rican state constitutions and the laws (art. 55), but it also provided a *Poder Conservador* with the same duty, but reporting to Congress (art. 68).

The Mexican Constitution of 1836, following the pattern of the French *Senat Conservateur*,¹⁵ also provided for a supreme *Poder Conservador*—a veritable fourth power, which had the power to declare the nullity of unconstitutional acts of any of the three powers upon demand of any one of them.

The Constitution of Quito, Ecuador, 1812 made the Supreme Congress a tribunal of censure and vigilance for the guardianship of the constitution (art. 10) and under the Ecuador Constitution of 1843, the Permanent Commission had the duty of watching over the observance of the constitution and of the laws, reporting to the President and to Congress. This duty was assigned to the Council of State in the 1851 constitution (art. 82) and the 1929 constitution (art. 117).

Nearly all these attempts to have a political body assume the guardianship of the constitution were doomed to failure—a notorious instance was that of the Mexican Fourth Power, which led to the dictatorship of Santa Anna. Elsewhere, these political organs were innocuous or inactive. The failure paved the way for adopting the principle of judicial review.

JUDICIAL REVIEW

Now let us cast a glance at the constitutional and statutory provisions for judicial review, and the actual practice in several countries.

Argentina

Although it is the country with the longest history of judicial review, with the exception of the United States, only a brief survey is here necessary, since Amadeo's excellent book, readily accessible, covers the subject. The supremacy of the constitution laid down in article 31, substantially taken from the United States Constitution, is maintained by the Supreme Court through the extraordinary remedy (*recurso extraordinario*) analogous to our former writ of error. The implementing statute, Law 48 of 1863, was modeled on the American Judiciary Act of 1789.¹⁶ An adversary "suit" is necessary involving

¹⁵ Constitution of Year VIII (1799), art. 21. See Jaffin, *New World Constitutional Harmony*, 42 Col. L. Rev. 532, 555-557 (1942).

¹⁶ President Mitre commissioned Dr. Manuel Rafael García to study the judicial

justiciable issues; but "suit" is not limited to a purely judicial controversy; the writ lies, for example from the final decision of a chief of police. The federal question must be pleaded or raised during the course of the suit below. As in the United States, all courts, both provincial (state) and federal, can pass upon constitutional questions. The constitutions of the provinces expressly authorize their state supreme courts to declare laws unconstitutional.¹⁷ From its very inception, in 1863 and 1864, the Federal Supreme Court asserted its right to declare laws unconstitutional. In 1863, it declared a presidential decree to be unconstitutional. In 1869 and 1871, the Supreme Court protected property and contractual rights against unconstitutional encroachments by provincial governments; in the former case, declaring unconstitutional a provincial statute depriving plaintiff of his property; in the latter case overruling a governor's decree ordering dissolution of a charitable society. It was not until 1887 that an act of Congress was held unconstitutional; Congress, it was held, could not change the Supreme Court's original jurisdiction, granted by the constitution, in any manner whatsoever. In a case in the following year, it held that in a statute authorizing condemnation (expropriation), Congress had exceeded its powers.

Only a party affected by the alleged unconstitutional statute or act of the Executive can question their constitutionality. No person can attack the constitutionality of a statute unless his economic interests or legal rights have been violated by the enforcement of the statute in question.

Until very recently,¹⁸ one striking feature in the Argentine decisions is the extent to which our decisions and constitutional authorities have been cited or quoted,¹⁹ and, except where there was a difference in the text of the constitution,²⁰ have been followed.

On numerous occasions, the court has acknowledged this indebtedness. The provisions of the constitution protecting property

system of the United States. His report was the basis for Law 48. It was published in Florence in 1863, *Estudio Sobre la Aplicacion de la Justicia Federal Norteamericana a la Organizacion Constitucional Argentina*.

¹⁷ For the older constitutions see *Digesto Constitucional Argentino* (1941). For a study and comparison of the more recent constitutions, Dana Montañó, *El 'Estado de Derecho' en la República Argentina*, *La Ley*, Dec. 22, 1958, 1-6.

¹⁸ In a recent volume of the Supreme Court reports examined, I found no citation of American authorities.

¹⁹ For translations of American writers see Nadelmann, "A Propos of Translations," 8 *Am. J. Comp. L.* 204 (1959).

²⁰ 44 sections of the two constitutions are practically identical, 22 similar, 48 are different and 60 sections of the Argentine Constitution are not found in the American. Linares Quintana, "Comparison of United States and Argentine Constitutional Systems," 97 *U. Pa. L. Rev.* 641-664 (1948-9).

rights have been interpreted in the light of the substantive and procedural concepts of due process of law enunciated by our Supreme Court. The provision in our Constitution prohibiting the states from impairing the obligation of contracts is not found in the Argentine Constitution, but the Argentine Supreme Court has decided, both as to the provinces and Congress, that contractual rights are property rights and cannot be impaired without violating the property clauses of the constitution. In applying the principle of equal protection in tax matters, the court has generally followed the precedents established by the Supreme Court of the United States.²¹

A few recent decisions on the extraordinary remedy may be cited, out of the hundreds in the reports and legal periodicals, to illustrate current practices and problems. The courts have upheld the power of Congress to reasonably regulate the professions²² and the power of Congressional committees to compel witnesses to appear, without prejudice however to the right against self-incrimination.²³ As a general rule, the extraordinary remedy does not lie against administrative resolutions, except where an administrative officer exercises judicial or quasi-judicial functions.²⁴ A statute restricting free choice of first names for children was declared, in part, unconstitutional.²⁵ Congress or the provincial legislatures may reduce pensions, provided the reduction be not arbitrary or confiscatory.²⁶

Statutes suspending summary proceedings for eviction against tenants were held unconstitutional.²⁷ *De Seze v. Gobierno Nacional*²⁸ declared void a Presidential decree revoking a grant of public lands. In several decisions, the court upheld strictly the requirement of full, prior compensation in eminent domain cases.²⁹

²¹ Amadeo 194-220. A comparable book in English on the other major countries, especially Brazil and Mexico, is needed. Amadeo is highly laudatory of the Argentine Supreme Court, and rightly so. The court suffered an eclipse in popular esteem during the Peron régime, but is regaining its former prestige.

²² *Re Peterffy*, S.C. Feb. 11, 1959; *La Ley*, Sept. 10, 1959, 5.

²³ *Habeas Corpus*, re Mendola, C.N. Fed. Capital, Apr. 3, 1959; *La Ley*, Sept. 8, 1959, 5.

²⁴ *Re Comisión Administradora* S.C. Dec. 30, 1958; 242 Fallos Corte Suprema 542 (hereinafter cited Fallos); *re David Hogg y Cia.*, Dec. 1, 1958, 242 Fallos 353 (involving the constitutional right to strike).

²⁵ Eder, "The Right to Choose a Name," 8 *Am. J. Comp. L.* 502 (1960).

²⁶ *Aguirre v. Province of Santa Fé*, Oct. 29, 1958; 242 Fallos 141.

²⁷ *Neumayer v. Cejas*, C. App., Rosario, Feb. 4, 1959; *La Ley* Apr. 15, 1959, with dissenting opinion that such statutes fell within the police power.

²⁸ Sept. 24, 1958; 241 Fallos 384, citing U.S. cases.

²⁹ *But see re Degó*, S.C. Oct. 20, 1958; 242 Fallos 73 (with dissenting opinions). In our own law, it is often difficult to distinguish between the *ratio decidendi* of a case and *obiter dicta*. This case illustrates the even greater difficulty when we deal with foreign decisions.

As a general rule, the Supreme Court will not admit the extraordinary remedy based on merely procedural questions or questions of fact and will return the case to the lower courts for final decision, but it will on occasion, where the case is clear, render final decision.³⁰

A retired officer is subject to the Code of Military Justice in respect of acts committed in a military establishment, including a hotel.³¹ In a criminal libel action, the refusal to permit evidence of "public interest" was held to be a violation of the constitutional guarantee (art. 18) of the right of defense.³²

The power to tax, the court holds emphatically, is *not* the power to destroy. Progressive taxes are not *per se* unconstitutional, neither is a surtax based on absentee ownership, but an inheritance tax of more than a third of the value of the property transmitted is confiscatory and unconstitutional; it would make the right of inheritance, guaranteed by the constitution, illusory.³³

In a dictum, the court rejects the theory of Duguit that property is a social function—"a theory that would lead to the negation of subjective rights, among others the right of property."³⁴ The Argentine court has been zealous in guarding the right to defense in court. This right extends to proceedings before administrative authorities exercising judicial or quasi-judicial functions.³⁵

The original jurisdiction of the Supreme Court under articles 100 and 101 of the constitution can neither be enlarged nor abridged.³⁶

*Bolivia*³⁷

We have already noted that Bolivia was the first of our countries to expressly provide for judicial review in its constitution, and have

³⁰ *Nación Argentina v. di Rosa*, S.C. Oct. 1, 1958; 242 Fallos 11, in effect overruling previous decisions.

³¹ *Re Gonzalez Victoria*, S.C. Sept. 10, 1958; 241 Fallos 342; *La Ley* Apr. 20, 1959, 6. The note in *La Ley* disagrees, holding that a civilian is never subject to military law.

³² *Stad v. Alemán*, S.C. July 2, 1958; 241 Fallos 65.

³³ *Re Synge*, Sept. 21, 1956, 235 Fallos Corte Suprema 883; but a tax of 50% on royalties received by foreign film companies was sustained. *Fox Film v. Nación*, 23 June, 1955, 232 Fallos 52.

³⁴ *O'Neill v. Huguibehner*, 13 April, 1956; 234 Fallos 384. Duguit's theory, and to a wider extent than he contemplated, has been incorporated in most of the recent Latin American constitutions.

³⁵ *Barbero v. Ruiz*, 16 Nov. 1955; 233 Fallos 74 (rent board).

³⁶ *Re Garay Vivas*, May 30, 1956; 234 Fallos 791.

³⁷ Paz, Luis: *Constitucion Política de la Republica de Bolivia*. Sucre, 1912. Trigo, Ciro Felix: (1) *Derecho Constitucional Boliviana*. La Paz, 1952 (printed in Argentina); (2) *Las Constituciones de Bolivia*. Madrid, 1958 (bibliog. IX-XIII). Clevens: *The Political Organization of Bolivia*. Washington, 1940.

quoted the pertinent provisions of the constitutions of 1851 and 1861. In the 1947 constitution, the provision appears as art. 145(2).

If the constitutional issue arises in a lower court, the record, after the parties have submitted their evidence and briefs, is sent to the Supreme Court for decision. The plaintiff must allege and prove a direct personal, not a merely speculative, injury arising from the law or its application. The defendant may be either a private person or the public official applying the law or the resolution. The 1945 constitution, as amended in 1947, provides that the ordinary courts may decide direct actions to declare the nullity of the acts of those who usurp functions or exercise jurisdiction or power not emanating from the law (arts. 27, 142). The principles, rights and guaranties recognized in this constitution, cannot be altered by the laws regulating their exercise and do not need prior regulations for their execution (*i.e.* they are self-executing (art. 28)).³⁸ The authorities and courts shall apply the constitution in preference to statutes (art. 182). The Supreme Court (art. 145) also takes cognizance, in sole instance, of suits against resolutions of the Legislative Power or of one of its Chambers, when such resolutions affect one or more concrete rights, either civil or political, and regardless of who may be the interested person.

In most constitutions, some inconsistent provisions are to be found. Perhaps none is more striking than a Bolivian instance. In addition to judicial review, the constitution adheres to the oft-repeated formula authorizing the Congress to interpret the constitution. In its present form (art. 181 of the 1947 constitution) it reads: "The Chambers may resolve any doubt that may arise as to the meaning of one or more articles of the Constitution." A two-thirds majority vote is required and such interpretative laws cannot be vetoed by the President. Congress has on occasion exercised this power. A law of September 6, 1898 interpreted article 47 of the then constitution as to immunities of Senators and Deputies. A law of December 1, 1931 interpreted the articles of the constitution as to the qualifications of deputies.³⁹ A law of December 20, 1948 declares "Article 31 of the Political Constitution of the State is interpreted in the sense that the non-retroactivity which it proclaims does not apply to the social laws." This practically repeals the prohibition against retroactivity.⁴⁰

³⁸ In one case however, the Supreme Court refused to apply a constitutional provision recognizing illegitimate children in the absence of a statute defining the procedure for filiation proceedings.

³⁹ Trigo (2), *op. cit. supra* note 37, note to article 65.

⁴⁰ Trigo (2), *op. cit. supra* note 37, note to article 31; Trigo (1), *op. cit. supra* note 37 at 55.

The Supreme Court had one era of grandeur beginning in 1880, when its decisions were enriched by the principles and practices of the Supreme Court of the United States.⁴¹ Since that era it would appear that very few laws have been declared unconstitutional.

*Brazil and the Writ of Security*⁴²

Brazil inherited the law of Portugal. Its first constitution (1824) after independence, known as the Imperial Constitution, setting up a limited monarchy, was largely modeled on the British system. Hence, judicial review was not contemplated. Despite this lack, Brazil was probably better governed under the Empire than it has been as a republic.

The first constitution of the Republic (1891) vested in the Supreme Court the right to review decisions of the state courts by a procedure, in essence similar to our writ of error under the Judiciary Act of 1789. This remedy, as in the Argentine, became known as the "extraordinary remedy." Article 60 vested in all federal courts the power to adjudge cases where a party either by action or defense raised a constitutional issue. State courts also passed upon constitutionality when that issue was involved with other questions. But, differing from the United States rule, if the plaintiff based his action directly and exclusively on a precept of the federal constitution, competence was vested solely in the federal courts.⁴³

The Brazilian Constitution of 1891 was derived chiefly from the Imperial Constitution. It took from the United States the principle of federalism with its concomitant judicial power. The example of the United States was a potent influence in other respects. Rui Barbosa, the chief author, was a profound student of our constitutional system, as have been several later jurists. More important was the fact that in working out the doctrine of judicial review, our Supreme Court decisions and constitutional authorities were generally followed.

Law 221 of 1894, art. 13, s. 10, gave the courts the power to refuse to apply "manifestly unconstitutional" laws. The Supreme Court exercised the power on occasion. Following the practice of the courts, full review was incorporated in the 1926 amendments (art. 60, s. 1) and was made still more explicit in the 1934 constitution.

⁴¹ Trigo (1), *op. cit. supra* note 37 at 661 *et seq.*

⁴² Jacques, *Curso de Direito Constitucional* (Rio 1956); James, *The Constitutional System of Brazil* (1923); Marchant, "The Brazilian Writ of Security," 19 *Tul. L. Rev.* 213-228 (1944); Pacheco, *Tratado das Constituicoes Brasileiras*, 2 v. Rio-Sao Paulo 1958; Pontes de Miranda: *Wald*.

⁴³ Lessa, Pedro: *Direito Constitucional Brasileiro. Do Poder Judiciario*, 102, 132, Rio 1915 (the classical work).

It is not surprising that in the first thirty years of the Republic, there should have been only a few instances of this power, especially as it was an institution wholly foreign to the system of law and government which preceded the republic.⁴⁴ But a recent author states that no less than twenty federal laws and ten state laws have been declared unconstitutional "which proves the vigor and efficiency of *judicial control*" (words in English).⁴⁵ He fails to weigh this against the number where constitutionality has been upheld.

More effective in practice to protect constitutional liberties than the extraordinary remedy was the surprising development given in Brazil by the courts to the writ of habeas corpus to enforce all constitutional guarantees—"habeas corpus disembodied" we may well call it.⁴⁶ The constitutional amendment of 1926 restricting habeas corpus to its original purpose to protect freedom of locomotion, wrecked the Brazilian habeas corpus as a means to protect all liberties. "The door that the courts had opened being now closed, it was necessary to open another";⁴⁷ the idea of a general writ of security (*mandado de segurança*) was brought forward and incorporated in the 1934 constitution.

In its present form (constitution of 1946, art. 141(24)), the constitutional provision reads:

Writs of security shall be granted in order to protect clear and certain rights not protected by habeas corpus regardless of what authority may be responsible for the illegality or abuse of power.

Illegality here includes unconstitutionality.

The procedure was regulated by Law 191 of January 16, 1936, later included in the Code of Civil Procedure (arts. 319-331) amended by Law 1533 of December 31, 1951.

Brazilian law is eclectic, derived from many sources. The writ of security was adopted as a successor to a summary special procedure in administrative matters, and drawing on the Brazilian doctrine of habeas corpus, on the theory of possessory rights as developed in Brazil and on foreign sources especially the Mexican *amparo*, American law and the French theory of abuse of rights.

At the beginning there was some confusion in the cases as to whether the proper remedy was habeas corpus or the writ of security.

⁴⁴ James, *op. cit. supra* note 42 at 9, 10, 107.

⁴⁵ Jacques, *op. cit. supra* note 42 at 279.

⁴⁶ See Eder, "Habeas Corpus Disembodied; the Latin American Experience," in *XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema* (in press).

⁴⁷ Pontes de Miranda, *op. cit. supra* note 42 at 235.

But this has now been clearly settled by the courts. Habeas corpus lies only against interference, actual or threatened, with freedom of locomotion. Habeas corpus was denied when the outlawed Communist Party brought the writ against the President of the Republic in an attempt to continue its existence as a political party. The Supreme Court said the plaintiff's rights could be decided only under a writ of security⁴⁸ (which apparently was no longer available).

The writ of security is a new institution in jurisprudence, typically and natively Brazilian, without a parallel elsewhere in the world. The principles of our writs of mandamus, prohibition, quo warranto and injunction are all embraced in the single Brazilian writ of security.⁴⁹

It is available for the protection of any certain and incontestable right threatened or violated by an act of any authority manifestly unconstitutional or illegal. It does not lie for acts where an administrative appeal may be used which has the effect of a temporary stay, nor against judicial orders or decisions where an appeal or other procedural remedy is available, nor against disciplinary acts unless exercised by an incompetent authority or without due process.

The term "any authority" in the constitution was broadly interpreted both by the courts and by the implementing laws. Under the dictatorial constitution of 1937, the writ did not lie against the President of the Republic or against members of the Cabinet. During the Vargas dictatorship, the use of the writ died out, to be revived without restrictions under the 1946 constitution. It lies against administrative and executive authorities of all ranks, high or low, and against legislative authorities. The writ (as in the case of the Mexican *amparo*) never lies against private individuals unless they are exercising public functions by delegation from the public power, e.g. public utility companies and trade unions which are deemed to be juristic persons of public, not private, law.

The writ must be asked within a term of 120 days; the defendant must present a report and defence within 5 days; the Attorney General's office is given 5 days within which to state its case and the judge must give judgment within 5 days thereafter. Theoretically the whole procedure takes only 15 days, but so great is the pressure on the courts this rarely happens.

A stay, suspension or interlocutory injunction may be ordered. The interlocutory injunction is of course of the utmost importance.

The documentary proof and other evidence must convince the

⁴⁸ Wald, *op. cit. supra* note 42 at 49-51; 2 Pacheco, *op. cit. supra* note 42 at 55 *et seq.*

⁴⁹ Wald, *op. cit. supra* note 42 at 73, 79.

judge beyond a reasonable doubt that the petitioner has a clear and definite right. There must be no uncertainty as to the facts. What constitutes a certain and definite right has been the work of the courts and the decisions are sometimes conflicting. Much is left to the discretion of the trial judge; the Supreme Court lays down only general standards and guides. The petitioner's clear right must be determinable *prima facie* without any examination as to the facts. The proceedings in this respect bear a resemblance to our motion for summary judgment. But the fact that questions of *law* are complicated and controversial does not prevent the grant of what the courts call the "heroic" remedy.

The writ has preference on the court calendar over every other action, except habeas corpus. The judge's order is enforced by a contempt proceeding if disobeyed. A stay may be granted if an appeal is filed. The denial of the writ is without prejudice to any other remedy the petitioner may have.

The writ does not lie to test the constitutionality of a statute *per se*, in the abstract. A concrete act on the part of a public authority violating or threatening directly a right of the petitioner is a necessary basis for the action. But a statute that is not truly legislative, but is in essence an administrative act may be attacked by the writ. The writ also lies when a statute is immediately self-enforcing or when, though in a general form, it is really directed against a single person. The tendency of the latest decisions seems to be, however, that a law or a tax may be declared unconstitutional, without concrete application, by means of the writ of security.

The law is not yet well settled as to the extent to which the writ of security can be used against judicial acts. The prior controversy was in part settled by Law 1533 of 1951. The writ does not lie against a court order or decision where there is a remedy provided by the procedural laws or the decision is open to revision. The statute has been broadly construed to allow the writ when the ordinary procedural remedy does not include a stay of proceedings.

The writ today (contrary to the rule in the United States) lies against the President of the Republic, but only in the Supreme Court. Against cabinet ministers, the Federal Court of Appeal is the competent court of first instance.

It is in the field of taxation that the writ finds its greatest application in today's practice, against unconstitutional or illegal taxes, *e.g.* interstate export taxes or violations of income tax exemption granted to journalists and professors. In tax matters, the courts have followed the maxim *in dubio contra fiscum*—a maxim we might well adopt. However, the constitutional provision that the salaries

of judges may not be reduced was held not to exempt them from the incidence of the general income tax. Other tax cases also have given rise to conflicts of opinion and dissenting opinions are frequent. The courtesy with which the judges of the Supreme Court, with very rare exceptions, treat their colleagues might well set an example for our own judges. Progressive inflation in Brazil has caused increasing difficulties and the use of the writ of security enjoining collection of illegal or arbitrary impositions, instead of the older method of an action for restitution, has served to mitigate injustice.

In urgent cases, the petition for the writ and notice to the defendant authority may be made by telegram or radiogram (Law 1533, art. 4). Discovery may be ordered (art. 6, *id.*).

Article 200 of the constitution (taken from article 179, 1934 constitution) provides that only by the vote of an absolute majority of all its members may a court declare a statute or act of the Public Power unconstitutional. Prior to 1934, a majority of the judges hearing the case was sufficient. As the Supreme Court is composed of 11 judges, a doubt was raised whether "absolute majority" meant 6 or 7 ($5\frac{1}{2} = 6$, plus one). The latter view was upheld by the court in 1948.⁵⁰

The Brazilians are justly proud of their invention of the writ of security. The difficulty with it, as in the case of the *amparo* in Mexico, is that the courts are overburdened with applications and have not the time to pass on them promptly.⁵¹

Chile⁵²

Chile differs laudably in many respects from most Latin American countries. Racial homogeneity, geographical isolation, external security, the long duration of its chief constitution (1833 to 1925), an uninterrupted series of presidential elections, a high level of intellectual achievement and educational institutions of noteworthy character, an independent judiciary of marked ability, a genuine respect for law and other factors combined to give it a singular position.

After an initial period of turmoil, the country achieved a stable government under the 1833 constitution, an autocratic, aristocratic

⁵⁰ Jacques, *op. cit. supra* note 42 at 273, 274.

⁵¹ Sa Freire, "Judicial Power," Inter-Am. Bar Ass. Proc. 10th Conference Buenos Aires (B.A. 1958) 205, 210.

⁵² Amunategui Jordan: Carvajal Ravest, Horacio: La Corte Suprema. Santiago, 1940; Guerra: Constitucion de Chile de 1925. Santiago, 1929; Huneus: Obras. Vol. 3. Estudio sobre Derecho Constitucional Comparado. Santiago, 1891; Roldan, Alcibiades: Elementos de Derecho Constitucional de Chile. Santiago, 1913; Shaw: The Early Constitutions of Chile 1810-1833. New York, 1930.

instrument of, by and for the upper classes on the model of the former British system, with leaders conscious of their responsibility. Portales, the author of this constitution, wrote:

Democracy is an absurdity in the (Latin) American countries; a strong central government, of men of model virtue and patriotism (is what we need) to lead citizens towards order and virtue. Not until these have been realized will the time be ripe for a completely liberal government, free and full of ideals, in which all citizens share.⁵³

The constitution of 1925 (which really did not come into effect until 1932) made radical changes. Among others, it introduced judicial review. Previously, judicial review had been generally thought to be a violation of the doctrine of the separation of powers. Some present-day Chilean writers and even the courts are still under the influence of that concept.

The Supreme Court in 1848 asserted that no court in Chile had power to declare laws unconstitutional. The supreme judgment of the legislator that the law he enacts is not opposed to the constitution dissipates all doubt in that regard and does not permit any delay in the execution of the provisions of the law.⁵⁴ Nevertheless, several clearly unconstitutional statutes were enacted.⁵⁵

In a circular addressed by the Supreme Court to the courts of appeal in 1867, it repeated this doctrine, but with a proviso that altered it completely: preference should be given to the constitution if a statute clearly and overtly conflicted with the constitution. Some courts seem to have exercised the power.⁵⁶ But the prevalent opinion was that the courts had no power. Shortly before the adoption of the 1925 constitution, the appellant in an expropriation case invoked the constitution. The court said:

Since in our constitutional system, there is no judicial authority which has the power to declare the unconstitutionality of the laws, the Court below . . . proceeded correctly in basing its decision on the statute above cited.⁵⁷

There was one exception to this negative attitude. A purported statute that did not meet the constitutional requirements for enactment, one that suffered from defects of form, not of substance, was treated as a nullity—it was not a law. Defects of “form” were within

⁵³ Guerra, *op. cit. supra* note 52 at 15.

⁵⁴ Quoted in full in Roldan, *op. cit. supra* note 52 at 486.

⁵⁵ Guerra, *op. cit. supra* note 52 at 458.

⁵⁶ Carvajal Ravest, *op. cit. supra* note 52 at 91, without, however, giving any citation.

⁵⁷ Martinez v. Fisco, Dec. 23, 1924; 24 Revista de Derecho y Legislacion I-418 (hereinafter cited as Rev. D.).

the jurisdiction of the courts, but not those of substance. The Supreme Court refused to apply two paragraphs of article 95 of the Judiciary Law which had been added by error.⁵⁸

The constitutional provision authorizing judicial review, article 86 of the 1925 constitution, reads:

The Supreme Court in private cases under its cognizance or which may have been submitted to it on appeal interposed in a case pending before any other court, may declare inapplicable to the case any legal precept contrary to the Constitution. This appeal may be taken at any stage of the case without suspending the proceedings.

No statute regulating the procedure was passed but the Supreme Court itself laid down the procedure in an *Auto Acordado* of May 22, 1932. A copy of the petition claiming unconstitutionality is served on the defendants; whether they answer or not, the record is then passed to the Attorney General (*Fiscal*). When he files his opinion, the case is placed on the calendar for hearing and decision. The full court sits to hear constitutional questions, nine judges constituting a quorum.

Judicial review is vested exclusively in the Supreme Court. It is deemed too delicate a matter to entrust to inferior courts. There must be a judicial controversy, an actual case in the courts, and the decision rendered applies only to the particular case.⁵⁹

In the early years, very few appeals were successful. Carvajal Ravest states only one.⁶⁰ The court interpreted its powers under article 86 very strictly. Of recent years, there seems to be a tendency towards a more liberal construction, and declarations of unconstitutionality have been more frequent.

The first important case involving judicial review seems to have been that of *de Castro*.⁶¹ The court refused to declare unconstitutional Law 4945 giving extraordinary powers of legislation to the President. The Court laid down a rule of strict construction of the new constitutional provision, which was consistently followed for many years.

⁵⁸ So stated in *re Richards*, Dec. 6, 1950; 47 Rev. D. I-537 (1950), where the court refused to use the remedy of unconstitutionality, which it holds, under the 1925 constitution, goes only to the substance of the law, not to its external form—the latter merely presents a question of “illegality” for the ordinary courts. A purported law that does not meet the requirements for due passage is not a law. And see Carvajal Ravest, *op. cit. supra* note 52 and the *Wilshaw* case, *infra*.

⁵⁹ Carvajal Ravest, *op. cit. supra* note 52 at 152. The influence of French writers criticizing the United States system may have been at work, notably Lambert: *Le Gouvernement des Juges* (1921).

⁶⁰ At 156.

⁶¹ Sept. 13, 132; 30 Rev. D. I-36 (1933).

"Legal precept" or statutory precept in article 86, it held, meant acts passed by Congress; not executive decrees. There have been many decisions to that effect. But there is substantial dissent among the authorities and some conflicting decisions as to whether the remedy of article 86 applies to decrees or not.⁶²

In the case of *Willshaw*,⁶³ the court was faced with the problem of a typographical error in the official publication (promulgation) of a penal law, which aggravated the punishment to be imposed. The appellant contended that there having been no due publication, the law was not applicable. The court refused to set it aside.⁶⁴

Unlike the rule in the Argentine, the question of unconstitutionality does not have to be raised in the lower court.⁶⁵

There is no provision in the Chilean constitution against retroactive legislation in civil matters. Retroactive laws as to taxation and labor relations (payments and bonuses to employees) have been repeatedly upheld by the court, except where there is a direct violation of property; to enjoy constitutional protection, there must be a property right in a specific, corporeal thing. Article 9 of the Civil Code against retroactivity is a statutory, not a constitutional, rule. Retroactivity is permissible even though it may impair the obligation of contracts.⁶⁶ But a law as to pensions of *public* employees was held unconstitutional.⁶⁷

Provisions of the Labor Code as to burden of proof do not infringe the constitutional guarantee of equality before the law.⁶⁸

The court has been zealous to protect property rights, when social welfare legislation is not involved. A law which authorized the

⁶² 1 Repertorio de Legislación y Jurisprudencia Chilena (n.d.), under article 1.

⁶³ Dec. 7, 1935; 33 Rev. D. II-1-209 (1936). The decision and reasoning of the court are severely criticized by Claro Solar in *id.* I-77-99 (a comparative study)—the court failed to make use of its constitutional authority and disregarded the constitutional provision embodying the principle of *nulla poena sine lege*.

⁶⁴ The views of the Colombian Supreme Court are in accord. See Grant, "New Jersey's 'Popular Action' in Rem to Control Legislative Procedure," 4 Rutgers L. Rev. 391-417 (1948-9).

⁶⁵ Salas Fernandez y Cia., 28 Sept. 1950; 47 Rev. D. I-431.

⁶⁶ Varela Varela: El Valor Constitucional de la Ley No. 9581, 47 Rev. D. (1950) 60, esp. 70 *et seq.* Law 9581 increasing the Social Security tax was upheld. Pérez, Dec. 28, 1951, 48 Rev. D. I-620. "*Compañía General de Electricidad*," Jan. 6, 1951; 48 Rev. D. I-6, upheld a law granting bonuses to employees of private companies. The doctrine of the social function of property was invoked. Four judges dissented.

⁶⁷ Romero Rojas, Jan. 7, 1952; 49 Rev. D. (1952) I-6.

⁶⁸ Zúñiga Latorre, Nov. 24, 1951; 48 Rev. D. III-65—one of the few cases in which the court cites commentators. It never cites its own decisions, but in fact often copies their language and follows them. In theory, in Latin American countries generally, there is no rule of stare decisis. The practice, however, I have found to be much like our own.

President to cancel leases of public lands without judicial process and to take possession was held unconstitutional.⁶⁹

Strict compliance with the constitutional provisions for just prior compensation in cases of expropriation (condemnation for a *public use*—the needs of the State are not sufficient as they are in some other countries) has been consistently enforced by the court. An expropriation law limiting the compensation to be paid to an amount not in excess of 10% over the assessed value on the tax roll, providing for payment in bonds and withdrawing valuation from the courts, is unconstitutional.⁷⁰ An article of the Expropriation Law providing for premature possession by the public authorities was similarly held invalid. The right of "property" protected by the constitution includes possession. Similarly a law providing for taking possession of lands prior to payment of compensation was held bad.⁷¹ Law No. 8736 of 1947 depriving Indians of the right to sell their lands was held unconstitutional as retroactive and constituting an unlawful deprivation of property.⁷² A law permitting the Executive to declare leases in the Magallanes territory to have been terminated by lapse was held unconstitutional.⁷³ A law reserving to the State certain mineral deposits, without prejudice to vested rights conferred under prior law, was upheld. An exploration concession, it was held does not constitute a vested right, but is a mere expectancy of obtaining title in the future. "Property" means a real right in a corporeal thing to be enjoyed and disposed of absolutely as owner.⁷⁴ A mining tax law imposing a tax of 50% of the royalties or rental received was held constitutional.⁷⁵

⁶⁹ Several cases, *inter alia*, Duncker, April 11, 1933; 30 Rev. D. I-290. Sociedad Agrícola, Dec. 15, 1955; 52 Rev. D. I-399. The court repeated the principle laid down in earlier cases that "the remedy of unconstitutionality or inapplicability is of a purely doctrinal character, since it does not give to the court any attribute other than to determine by a simple comparison of the statute with the text of the constitution whether there is a conflict; that is to say, the remedy does not decide any of the other questions that are at issue in the suit and must be limited solely to decide if the law attacked is to be applied therein or not. It is sufficient, in instituting the remedy, that there be a possibility (certainty is not required) that an unconstitutional statute may be applied to the matter in controversy. The court will not pass on the facts or the evidence. Any other posture would lead to a review of the rights of action and defenses on the merits at issue; this would denaturalize the purpose and character of the proceeding which differs substantially from those of other appeals instituted in the procedural Codes."

⁷⁰ Several cases, *inter alia*, Arzobispado de Santiago, July 22, 1952; 49 Rev. D. I-259.

⁷¹ De Voto Podesta, Nov. 28, 1955; 52 Rev. D. I-376; Reyes Rioseco, Jan. 9, 1952; 49 Rev. D. I-18.

⁷² Several cases, *inter alia*, Medina Belmar, May 24, 1955; 52 Rev. D. I-118.

⁷³ Curtze, Aug. 5, 1941; 39 Rev. D. II, I-184.

⁷⁴ Compañía Salitrera, Jan. 14, 1943; 40 Rev. D. II, 1-459. There are Colombian decisions to the same effect. The injustice would seem self-evident.

⁷⁵ Société Hauts Fourneaux, 12 May, 1948; 46 Rev. D. 2.I.6 (1949).

A judicial controversy, that is an actual suit in a court of justice, is required. Consequently, the court will not intervene in electoral matters,⁷⁶ nor in proceedings to remove a judge.⁷⁷ If a suit has been terminated and no appeal taken, article 86 cannot later be resorted to.⁷⁸

*Colombia*⁷⁹

Colombia is by far the most interesting country in Latin America for the study of judicial review. It introduced in practice two notable innovations which have been widely copied—judicial review by Executive Reference prior to promulgation and the “popular”⁸⁰ or public action to declare the unconstitutionality of statutes. I shall not give it the space it deserves since the field has been ably covered by J. A. C. Grant in a series of noteworthy articles.⁸¹

The earlier constitutions with one exception already noted did not provide any form of judicial review. Under the federal system (beginning in 1853, reaching an extreme with the 1863 constitution and expiring with a revolution in 1885), the Senate was vested with the power to declare void acts of the states in violation of the national constitution. Nullification by a majority of the states of unconstitutional acts of Congress was authorized. The Supreme Court had only a limited power of suspension until the Senate acted. The Senate's numerous decisions were often marred by strong political bias, almost inevitable when such a matter is left to a political body.

⁷⁶ Urrejola, Jan. 4, 1933; 30 Rev. D. I-176.

⁷⁷ Rodriguez, June 8, 1933; 30 Rev. D. I-399.

⁷⁸ López v. Cia. Nacional de Teléfonos, 26 Nov. 1931; 29 Rev. D. I-194 (1932). Colombian cases are in accord.

⁷⁹ Caro, Miguel Antonio: *Estudios Constitucionales*. Bogotá, 1951; Constain: *Elementos de Derecho Constitucional*, 2d ed. Bogotá, 1951; Gibson: *The Constitutions of Colombia* 1948; Perez, Francisco de P.: *Derecho Constitucional Colombiano*. 3d. ed. 2 v. Bogotá 1952; Pombo, Manuel Antonio y Jose Joaquin Guerra: *Constituciones de Colombia*, 4 v. Bogotá, 1951 (1st ed. 1892); Samper, Jose Maria: *Derecho Publico Interno de Colombia. Historia Critica Del Derecho Constitucional Colombiano Desde 1810 Hasta 1886*. 2d ed. 2 v. Bogotá, 1951; Tascon, Tulio Enrique: *Historia del Derecho Constitucional Colombiano*. Bogotá, 1953

⁸⁰ In our phraseology, a popular action is one for a statutory penalty which is given to the person who sues for it. 1 C.J.S. “Actions” § 1 at 948 (1936).

⁸¹ “‘Contract Clause’ Litigation in Colombia; a comparative study in Judicial Review,” 42 Am. Pol. Sci. Rev. 1080 (1948); “New Jersey's ‘Popular Action’ in Rem to Control Legislative Procedure,” 4 Rutgers L. Rev. 391-417 (1948-9); “Judicial Review by Executive Reference Prior to Promulgation—the Colombian Experience,” 21 So. Cal. L. Rev. 154-171 (1948); “Judicial Control in Colombia,” 23 So. Cal. L. Rev. 484-504 (1950); “Judicial Control of Legislation,” 3 Am. J. Comp. L. 186-198 (1954); and other articles of his cited in these. See also Eder, *Advisory Opinions and Declaratory Judgments with Respect to Constitutional Questions*. Sixth Conf. Inter-Am. Bar Ass'n, Detroit, 1949 (also in Spanish).

The 1886 constitution (art. 90) provides that if the President vetoes a bill on the ground that it is unconstitutional, and Congress insists on the measure, it shall be remitted to the Supreme Court for its opinion as to constitutionality. The Supreme Court must render its opinion within six days. If the Court upholds constitutionality, the President is obligated to sign and promulgate the law; if it decides adversely, the bill is tabled.

The term of six days is obviously very short for a full discussion, but the court has held that the time does not begin to run until the Attorney General's opinion has been filed. Even so the term is short, especially since the court has ruled that when it has once rendered an opinion that the bill is constitutional, no one can later raise the question that the law has violated his constitutional rights.

Such a decision, then, is not an advisory opinion in the North American sense of the term but goes much further. Under our few state constitutions which provide for them,⁸² advisory opinions are advisory in the strict sense, that is, they are not authoritative judgments. In performing this function, the judges act not as a court but as the constitutional advisers of the other branches of the government. The opinions rendered do not have the force of a judicial decision. Unlike Colombia, there can be no question that the matter can be thrashed out *de novo* in the courts by any person who claims that his constitutional rights have been invaded by a law as to which an advisory opinion has been given.⁸³

Advisory opinions, whether decisive or not, are surely not an answer to the problem. The procedure was often used in Colombia, but after the introduction of the popular action, it gradually fell into disuse.

The 1886 constitution (still in force) did not originally provide for any other form of judicial review. To allay fears, the Bill of Rights was incorporated in the Civil Code, but this was rendered nugatory by the precept that a later law takes precedence over an earlier one and by Law 153 of 1887 (art. 6) which declared that "an express provision of a law subsequent to the constitution is to be deemed constitutional and is to be applied even though it appears to be contrary to the Constitution." Result: a flood of unconstitutional statutes.

In 1910, after nearly three decades of virtual dictatorship, a constitutional amendment of transcendental importance was enacted. Article 41 of amendment No. 3 of 1910 (now article 214) provides:

⁸² Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, South Dakota.

⁸³ 17 C.J. § 150 at 445 *et seq.*; 21 C.J.S. "Courts" § 190 at 316 (1940); 1 Thayer, Cases on Constitutional Law, 156, 175-176 (1895); 2 Tunc Nos. 230, 244, pp. 237, 263, 264.

To the Supreme Court of Justice is entrusted the guardianship of the integrity of the Constitution. Consequently, in addition to the powers conferred upon it herein and by the laws, it shall have the following:

To decide definitively as to the enforceability (*exequibilidad*) of Legislative Acts which have been vetoed by the Government or as to the laws and decrees challenged before it by any citizen as unconstitutional, after hearing the Attorney General of the Nation.

Constitutional questions may be raised in the course of ordinary litigation (art. 215) in all courts but this method is rarely used in view of the public action.

Grant traces the popular action to the experience in Colombia itself in connection with local government. The popular action has deep roots in Spanish and Spanish American law, dating from Roman law, reproduced in the *Siete Partidas*. Instances of it are to be found in many texts.⁸⁴

In Colombia, several hundred petitions to declare unconstitutionality by the popular action, have been filed and about a fourth of them have been successful. Statutes have been invalidated because they disturbed rights vested under contracts or under prior laws, interfered with freedom of contract or with freedom of speech, took private property for public use without adequate compensation, appropriated money for other than a proper governmental purpose, or granted special privileges in defiance of the principle of equality before the law.⁸⁵

A few recent cases may be noted. A statute vesting the Ministry of Justice with judicial functions in labor disputes was held invalid,⁸⁶ and also one prohibiting teaching of dentistry, pharmacy and allied

⁸⁴ Cadiz Constitution of 1812, art. 373, followed in many of the early Spanish American constitutions. In the early constitution of Buenos Aires and in Peru nearly all the constitutions, beginning with that of 1823 (art. 109) provided for a popular action against judges guilty of misfeasance (criticized by Colmeiro, *Derecho Constitucional de las Repùblicas Hispano-Americanas*, 366-370 (Madrid, 1858)). Venezuelan Constitution of 1858 (art. 118(8)), initiating judicial review. Article 20 of the Costa Rican Constitution of 1871. Judiciary Law of Ecuador (1922, art. 5), popular action to challenge the qualifications of judges.

⁸⁵ Full citations in Grant, "Judicial Control in Colombia," *supra* note 81. Pérez regrets that the Supreme Court has not used to its full extent the powers conferred on it, having introduced unwarranted distinctions and exceptions, *op. cit. supra* note 79, vol. 2, 290-295. The court rejects the doctrine of implied or inherent power in the court and bases its view on strict interpretation of its authority. Judgments of Feb. 15, 1915; 23 G.J. 253; May 26, 1931, G.J. 413. Power to pass on the constitutionality of decrees of the Government formerly vested in the Supreme Court was withdrawn, in part, from its jurisdiction and assigned to the Council of State, the highest administrative court, by Amendment No. 1 of 1945. For the Council of State, see Gibson, "The Colombian Council of State," 5 J. Politics 291 (1943).

⁸⁶ Montoya Mejía, Sept. 10, 1958; 89 G.J. 3.

professions except in universities and institutions recognized by the State, as an infringement on the freedom (subject to inspection) of teaching.⁸⁷ A decision that has aroused lively interest holds that confiscation of enemy alien property is unconstitutional.⁸⁸

The popular action is believed by Colombian writers to be superior to the American system in that it does not depend upon the chance occurrence of adventitious litigation. In practical effect, it is not unlike our declaratory action. The system has the advantage of avoiding long delays in settling a controverted constitutional point. It also permits challenge of statutes dealing with purely administrative matters not likely to become the subject of private litigation and thus integrates the duty of the Supreme Court to act as guardian of the whole constitution and not merely of the Bill of Rights.⁸⁹ These advantages, as a practical matter, probably outweigh the defects of the system, some of which could be remedied by procedural changes. The chief defect however, lies in the nature of the proceeding itself. The court passes upon what is really a moot or academic question, rather than an actual controversy. No ox is gored. This is in striking contrast to the declaratory action procedure in the United States and the British Commonwealth, which the courts will not entertain unless there is a real controversy.

Analogous provisions as to judicial review before promulgation, arising from a veto on the ground of unconstitutionality, are to be found in the Ecuadorean Constitution of 1869 (art. 43) and later ones. The Colombian formula was copied by several countries, with minor modifications. Panama's first constitution (1904) adopted it. In its present form (constitution of 1946, arts. 131, 167) the power includes not only bills, but also constitutional amendments objected to by the President.⁹⁰

In Venezuela under the 1945 (arts. 89, 90, 91) and 1953 (art. 90) constitutions, the bill is submitted to the Federal Court for definitive decision. The provision is contained in the 1939 and 1950 (art. 52) Constitutions of El Salvador, Honduras 1936 (art. 108); Nicaragua 1939 (art. 257(17)), 1950 (art. 229(17)). The Constitution of Costa Rica (1949, art. 128) contains a similar provision; a two-thirds vote of all the members of the court is required to declare the bill unconstitutional.⁹¹

⁸⁷ Isaza Moreno, Sept. 12, 1958; 89 G.J. 8.

⁸⁸ Eder, 54 Am. J. of Int'l. L. 159 (1960).

⁸⁹ This is stressed by Tena in connection with the Mexican *amparo*, defective in this regard.

⁹⁰ 1 Goytia, Bases y Doctrinas de Derecho Publico, 33, 34 (1948). In Colombia the veto on constitutional grounds does not extend to amendments to the constitution. 2 Perez, 76-79.

⁹¹ In the Cuban Constitution of 1940 (arts. 22, 23) there is a special case. Socialist

True advisory opinions are authorized to be given by the Supreme Court in the cases determined by the constitution and laws (Nicaragua, 1893, art. 92; 1939, arts. 200, 256(20); 1950 art. 179); and Costa Rica (1949, art. 167) requires the legislature to seek the opinion of the Supreme Court as to all bills concerning the organization or functioning of the Judicial Power. To reject the opinion of the court, a two-thirds vote of the full membership of the Legislature is required. In Honduras (1906, art. 79) advisory opinions in regard to bills affecting the administration of justice were authorized and in the present constitution (1957, art. 246) on constitutionality in case of veto.

The popular action was adopted in Ecuador in 1929 (never effective), Haiti in the same year, by Cuba in 1934, by Panama in 1941, and by El Salvador in 1950. It had been incorporated in the 1858 Constitution of Venezuela as to state legislation.

In Brazil:

Any citizen shall be a legitimate party to plead the annulment or declaration of nullity of acts injurious to the patrimony of the Union, of the States, of the Municipalities or autarchic entities and of corporations of mixed economy.⁹² (art. 141(38)).

Paulino Jacques calls this a "right of popular action."⁹³ It seems substantially similar to our taxpayer's action. Taxpayers in most of our states, are held to have a sufficient interest to maintain a suit to enjoin action by state or municipal officers under an invalid law which will affect the property of the state or political subdivision, or the amount of taxes to be paid.⁹⁴

As to Peru's "popular action," see *infra*.

*Costa Rica*⁹⁵

Costa Rica stands apart from other Central American countries, with a largely white population, a high literacy rate, a relatively

tendencies in the constitutional convention succeeded in restricting the former principle of the invalidity of retroactive laws affecting vested rights. Retroactive laws are permitted provided that they are passed by a two-thirds vote of the total membership of both chambers and are approved by the Tribunal of Constitutional Guarantees (the Supreme Court) if the "Social utility or national necessity" motivating the bill in question is challenged.

⁹² *I.e.*, in which the State is a participant.

⁹³ Curso de Direito Constitucional, 25. Rio (1956).

⁹⁴ 43 C.J.S. "Injunctions" § 119 at 654, n.63 (1945); *Id.*, § 108, p. 619; 64 C.J.S. §§ 2156-2172, pp. 982-1012.

⁹⁵ Zeledon, Marco Tulio: (1) Digesto Constitucional de Costa Rica. San José, 1946 (a compilation of the constitutions with historical introduction). (2) El Recurso de Inconstitucionalidad. San José, 1948 (reprint from 3 Revista del Colegio de Abogados No. 25, Jan. 1948).

peaceful history and a record of democracy, not dictatorship. The rule of law has been predominant.

The 1871 constitution repeating substantially earlier formulas, declared "the provisions of the Legislative or Executive Power which are contrary to the Constitution are null and of no effect, whatsoever be the form in which they are issued." An amendment introduced the vital addition: "The courts of justice shall not obey or apply them in any case." This power was exercised occasionally.⁹⁶

The lower courts no longer have the power to declare unconstitutionality. The 1949 amendments to the constitution vest such power exclusively in the Supreme Court and require a two-thirds vote of the whole court for such action.⁹⁷

Cuba

Cuba's independence was due to the United States, a fact that present-day vociferators choose to forget. The United States Military Government introduced many changes in the law; some of its enactments are still in force. Many of the revolutionary leaders had lived in the United States. In the constitution of 1901, naturally based in large part on that of the United States, judicial review by the Supreme Tribunal was adopted as a matter of course (art. 83), on our pattern that the issue of constitutionality could be raised only in a litigated case by an injured party.

The implementation of the provision for judicial review was left to the legislature, which enacted a law on May 31, 1903. Every controversy between parties as to the constitutionality of a law, decree or regulation was to be determined exclusively by the Supreme Tribunal of Justice. If a constitutional issue were raised before any civil, criminal or administrative judge or court, no decision on the particular

⁹⁶ Judiciary Law (1887) art. 8. Haines, 611-618 quotes from a few cases. Twenty cases between 1938 and 1948 are narrated in Zeledon (2) *op. cit. supra* note 95 at 26-35, 39. In only three (against executive decrees) was unconstitutionality declared, although in several, a majority (but not the requisite two-thirds) considered the laws or decrees in question to be unconstitutional. This creates an unfortunate situation. The requirement of a special majority seems to be unwise. Several state constitutions have special requirements for a declaration of unconstitutionality—Colorado, Ohio, South Carolina, Virginia.

⁹⁷ The exclusive jurisdiction of the Supreme Court had already been declared by statute as also the requirement of a 2/3 vote (Judiciary Law, art. 8; Code of Civil Procedure, arts. 962-969). Zeledon, *op. cit. supra* note 95, considers this legislation to have been unconstitutional, 36 *et seq.* Only an injured party can raise the question. Marshall Jimenez v. El Estado, June 7, 1947, Sentencias de la Corte de Casación 1947, 415 (voiding a presidential decree cancelling Costa Rican citizenship and confiscating property of Nazis). And see Steinvorth v. El Estado, Aug. 30, 1948, Sentencias 1948, 569.

point was to be made, but the judgment was to state that fact and the parties could thereupon file an appeal of cassation. The Supreme Tribunal on deciding the appeal would determine the constitutional question. Any person against whom a law deemed by him to be unconstitutional, was applied outside of judicial proceedings, had the right (but only within five days) to serve written notice on the authority so applying it of his intention to resort to the Supreme Tribunal. The five day limitation often proved a stumbling block.

At times, when freedom reigned, the court exercised the right freely. In a short period (1930-1932), the Supreme Tribunal declared 35 unconstitutionalitys, among others, a decree prohibiting public meetings; a restrictive article of the Habeas Corpus Act of the United States Military Government; restrictions on freedom of the press; and a part of the military law that subjected civilians to military jurisdiction. In nearly 40 years, to June, 1942, 86 laws and decrees had been declared unconstitutional.⁹⁸

The 1934 constitution copied the Colombian popular action, but required the petition to be made by 25 citizens. The public action was carried forward in the 1940 constitution, but in an extremely complicated system. When the Supreme Tribunal sits as the Tribunal of Constitutional Guarantees, the presence of at least 14 judges is required. The present Organic Law is No. 7 of May 31, 1949. Within the jurisdiction of the Tribunal as a constitutional court of guarantees are, *inter alia*, the popular or public action of unconstitutionality; issues in private actions by an aggrieved party; consultations by inferior courts; the recourse for abuse of power by officials; and habeas corpus. (Const. 1940, arts. 172, 174, 182, 183, 194, 195).

The provisions of the constitution and of the statute as to the direct public action before the Supreme Tribunal, brought by a sole citizen, a potentially aggrieved party, leave considerable room for doubt as to the exact situation; conflicting decisions and dissenting opinions have been frequent. The five day limitation is still in force. In the case of the public action by 25 citizens, there is no such limitation.⁹⁹

A constitutional issue can be raised in ordinary litigation in a court, either by appeal (cassation), as under the 1901 constitution, or by the remedy of unconstitutionality. The lower court does not pass on the issue, but remits it to the Supreme Tribunal in consultation, at the instance of a party, or on the judge's own motion.

⁹⁸ Garceran, 148-151; Infiesta, 255; De Montagu, 19 Repertorio Judicial, Jan. 1943, 3-10.

⁹⁹ Infiesta 106-110; Garceran, 244-345.

Or the issue may be brought directly before the Supreme Tribunal by a popular action brought by an aggrieved party.

Castro's constitution is a typical instance of a Spanish American tendency to give a color of legality to acts of dictatorship. The Fundamental Law of the Republic was promulgated on February 7, 1959 by the President and Council of Ministers. It incorporates many of the provisions of the 1940 constitution, including with slight variations (arts. 172, 173), those as to judicial review in that constitution (arts. 194, 195). The transitory provisions suspend guarantees, including habeas corpus, as to Batista's partisans, suspend the right to claim unconstitutionality and the judges' irremovability. The final article of The Agrarian Reform Law of May 17, 1959 declares "this law to be an integral part of the Fundamental Law of the Republic; consequently this law is given constitutional force and hierarchy."

The reaction against dictators can be violent and bloody. A nice regard for constitutional proprieties or for the "rule of law" is not a characteristic of bloodthirsty revolutionists.

Dominican Republic et. al.

I omit reference to the Dominican Republic, Haiti, Honduras, Nicaragua and Paraguay, since judicial review has not taken root, although provided for in the constitutions. The 1947 constitution of the Dominican Republic, true to the dictatorial, totalitarian system prevalent in the land, abolished judicial review.¹⁰⁰

*Ecuador*¹⁰¹

The early constitutions of Ecuador were silent as to the constitutionality of statutes. The 1845 constitution and that of 1851 (art.

¹⁰⁰ Dominican Republic: Miranda 203, 204. It is reported that the present dictator assures the independence of the judiciary by receiving the undated resignations of the judges at the time of their appointment. Honduras 1894, arts. 125, 128; 1936, arts. 141, 145; 1957, arts. 232, 236-239; Stokes, Honduras an Area Study in Government, 106 *et. seq.*; 137-147 (bibliog. 333-340); Coello, Augusto C., *El Digesto Constitucional de Honduras (1824-1921)*. Tegucigalpa, 1923. Nicaragua 1893, arts. 106, 117; 1939, arts. 261, 345, 346 (unchanged in 1950 constitution); Hernandez Somoza, J.: *Curso de Derecho Constitucional Nicaraguense*. Managua, 1899; Alvarez, Emilio, *Ensayo Historico Sobre el Derecho Constitucional Nicaraguense*. Managua, 1936. Paraguay 1940, arts. 87, 91; Jaffin, "New World Constitutional Harmony," 42 *Col. L. Rev.* 523, 570 (1942). It has been the view of Santo Domingo authorities that an unconstitutional statute was to be held void by the courts whether or not there be an express right of review granted in the constitution. MEJIA Ricart, Gustavo Adolfo: *Historia del Derecho Dominicano*, 236 (Santiago, Rep. Dom. 1943). Haiti: Justin: *De l'Organisation Judiciaire en Haiti*, Havre 1910; Dodd, 303.

¹⁰¹ Borja y Borja, Ramiro: *Derecho Constitucional Ecuatoriano*. 2 v. and appendix. Madrid, 1950. Noboa, Aurelio: *Recopilacion de Leyes del Ecuador*, t. 1. Constituciones. Quito, 1898.

35) declare that no law in conflict with the constitution shall have effect. Intermediate constitutions were silent. The 1897 charter (art. 132) and later ones provide that the constitution is the supreme law of the land (1906, art. 6; 1929, art. 61; 1945, art. 163; and 1946, art. 189). This provision is meaningless from the standpoint of judicial control, in view of the exclusive power of Congress to decide as to constitutionality (*supra*).¹⁰² Under the present constitution (1946), the Supreme Court is vested with the power to examine and decide provisionally whether a statute complies with "formal" requisites (*i.e.* as to enactment), but the ultimate decision lies with Congress. Similarly, the Council of State can pass provisionally on Presidential decrees, the definitive decision against resting with Congress.¹⁰³

*El Salvador*¹⁰⁴

The 1886 constitution (art. 110) gave the courts jurisdiction, within their power of administering justice, to declare the inapplicability of any law or provision of other branches, contrary to constitutional precepts, in cases in which they may have to pronounce judgment. This is repeated in the 1950 constitution (art. 95).

Very few cases on constitutionality are reported. A decision of 1904 as to leases was held constitutional. The right of the General Assembly to grant amnesty, even for common crimes, was upheld. The court will not pass judgment on the legal bases the Executive has to decree expropriation, but a decree of expropriation of property for a private, not a public, road was held unconstitutional.¹⁰⁵

The 1950 constitution (art. 96) introduced the Colombian popular action, *viz*:

The Supreme Court of Justice shall be the sole tribunal competent to declare the unconstitutionality of laws, decrees and regulations, both as to form and content, in a general and obligatory manner and may do so upon the petition of any citizen.

The inclusion of "form" was presumably in order to expressly reject the doctrine laid down by the Colombian Supreme Court that it will not declare a statute unconstitutional for defects of external

¹⁰² Prior to 1898, there had been eleven laws "interpreting" the constitution.

¹⁰³ 1 Borja, *op. cit. supra* note 101 at 646-652. He severely criticizes the Ecuadorean system, 656-658.

¹⁰⁴ Aguirre Cardona, *La Historia Constitucional de el Salvador*. Talca (Chile) 1954 (thesis). Colindres, *Jurisprudencia Salvadorena* 2 v. Santiago de Maria, 1915. Gallardo, Miguel Angel, *Cuatro Constituciones Federales de Centro America y Las Constituciones Politicas de el Salvador*. San Salvador, 1945. Goches Castro, Angel, *Indice de la Jurisprudencia Salvadorena 1901-1902*. Santa Ana 1935. Menendez, Isidro (comp.), *Recopilacion de Las Leyes del Salvador*. 2 ed. San Salvador 1956.

¹⁰⁵ Colindres, *Id.*, vol. 1, 31, 63, 121; vol. 2, 397.

form, *i.e.*, for failure to comply with the requirements as to enactment, *etc.*¹⁰⁶

*Guatemala*¹⁰⁷

The 1921 amendments to the constitution amended article 93 to read:

Within the power of administering justice, it corresponds to the Judicial Power to declare the inapplication of any law or provision of the other Powers, when contrary to the precepts contained in the Constitution; but it can make use of this faculty only in the judgments it pronounces.¹⁰⁸

The 1927 amendments to the then constitution provided a remedy by *amparo* (see *infra*) and amended article 85 to read:

It corresponds to the Supreme Court of Justice to declare on pronouncing judgment, that a law, whatsoever be its form is not applicable because contrary to the Constitution. It also corresponds to the tribunals of second instance and to judges of record (*juces letrados*) who have cognizance in first instance, to declare the inapplication of any law or provision of other Powers when contrary to the precepts contained in the Constitution of the Republic. The said inapplication can only be declared by the courts referred to, in concrete cases, and in the resolutions they pronounce.

The 1945 constitution retained these provisions. It also declared (art. 50):

Statutory, governmental or other provisions which regulate the exercise of the rights which this Constitution guarantees are null *ipso jure*, if they diminish, restrict or tergiversate them.¹⁰⁹

This was repeated in article 73 of the 1956 constitution which also provides (art. 187):

In every action and appeal, the interested parties may petition for a declaration of the unconstitutionality of the law therein involved.

This constitution was promulgated under Castillo Armas two years after the military defeat of the Arbenz communist regime. It outlawed the Communist Party and any other totalitarian system

¹⁰⁶ The "enrolled bill" doctrine praised by Grant, "New Jersey's Popular Action," 4 Rutgers L. Rev. 391 (1948-9); Criticized by 1 Perez, *op. cit. supra* note 79 at 290.

¹⁰⁷ Echeverria S., Buenaventura, Derecho Constitucional Guatemalteco Guatemala 1944. Silvert, K. H., A Study in Government. Guatemala (1954) 45, 47 (bibliog. 95, 96). Rocz Bennett, Jose, Digesto Constitucional de Guatemala, 1949 (reprinted from 7 Revista de la Facultad de Ciencias Juridicas y Sociales Nos. 2, 3 and 4.

¹⁰⁸ The Judiciary Law of 1889 had provided that the court cannot under any pretext suspend compliance with statutes and regulations.

¹⁰⁹ An "ambiguous and perilous" provision. Miranda, *op. cit. supra* note 100 at 131.

(art. 23). Among the transitory articles it provided (No. 7) that expropriations and adjudications made by the Provisional Government Junta could not be challenged as unconstitutional. It provided (art. 75) for a public action for the prosecution of violations of the principles of the Bill of Rights; such action may be brought by a simple denunciation without bond and without formality of any kind (repeated from art. 50, 1945 constitution).

To judge by the reports of the last few years, *amparo* has proven an ineffectual arm to protect individual rights or to maintain the legislature and executive within constitutional limits. Grant narrates a case in which confiscation of the property of the ex-dictator Ubico was held unconstitutional.¹¹⁰ Arbenz and his followers did not fare so well. Neither did Nottebohm, of international fame.¹¹¹

*Mexico and the Amparo*¹¹²

The constitutionality of legislation is tested in Mexico by the suit of *amparo*, as typically and natively Mexican as *pulque* and the *tortilla*. Its inspiration was probably derived from the writ of habeas corpus, although some extreme nationalists or hispanicists have essayed other origins. The Mexican founding fathers asked themselves: Why should not the blessings of habeas corpus be extended to all of the constitutional freedoms? Accordingly, first in the constitution of 1847 and more fully in the immortal constitution of 1857, provision was made for the *amparo*. A long civil war and the French invasion prevented use. Then followed the decades of the dictatorship of Porfirio Díaz. Nevertheless, there sprang up under him the golden age of Mexican jurisprudence and with Vallarta (Mexico's John Marshall) as President of the Supreme Court *amparo* was moulded and took on substantial proportions.¹¹³ Emilio Rabasa's writings contributed to the development of the *amparo* in the constitution of 1917. Both men admired the United States constitutional system and Vallarta's decisions were modeled on American theories.¹¹⁴

¹¹⁰ "Due process of ex-dictators; a study of judicial control of legislation in Guatemala," 41 Am. Pol. Sci. Rev. 463-469 (1947). *But see* Samayoa Bonifaz v. Ubico, S.C. May 19, 1950, 70 Gaceta de los Tribunales 60, in which by virtue of later decrees expressly retroactive, the defense of unconstitutionality was rejected.

¹¹¹ Nottebohm, S.C. Oct. 17, 1951; 71 Gaceta 146; Peralta v. President of the Republic, 80 Gaceta (1958) 98.

¹¹² Tena Ramirez: Leon Orantes: Burgoa: Clagett, "The Mexican Suit of Amparo," 33 Geo. L. J. 418-437 (1945). Fix Zamudio, "El Amparo contra leyes," 13 Boletín del Instituto de Derecho Comparado de Mexico, No. 37, En-Abr. 1960, 11-40.

¹¹³ Vallarta, Ignacio: El Juicio de Amparo y el Writ of Habeas Corpus 1881; 2 ed. 1896 (a classical work): Cuestiones Constitucionales 4 v. 1878-1883.

¹¹⁴ Tena 4th ed., *op. cit. supra* note 112 at 80-84, thinks that at least today, even though the texts may be analogous, American cases and doctrine are of little service to interpret the Mexican constitution. Other judges and lawyers disagree.

The original purpose of *amparo* was to provide a remedy in court to an injured individual against an attack by an act of a public authority against his lawful rights or interests guaranteed by the constitution. By what some deemed to be a deviation from the original purpose, but finding a basis in articles 14 and 16 of the 1857 constitution (substantially the same in the 1917 charter), the Supreme Court and authoritative commentators upheld the view that *amparo* should afford protection against illegal acts,¹¹⁵ and that any failure by a court or by an administrative authority to "exactly," *i.e.*, correctly apply a code or other statute was a violation of a constitutional right. Hence *amparo*, though technically a separate action, has in effect become the ordinary and usual means of appeal. With this aspect of *amparo*, we are not here concerned, although it is of far greater interest and importance to the ordinary man and lawyer than the power to declare the unconstitutionality of statutes.

The chief characteristics of *amparo* may be summed up thusly: (1.) It is directed solely against an act of a public authority (legislative, administrative, executive or judicial)—there is no possibility of a constitutional issue being raised in private litigation; (2.) Proof is required of a direct and personal injury (it need not be financial); (3.) The decision applies only to the particular case, a general declaration in respect of the law or act being prohibited. The suspension, very like our interlocutory injunction, authorized by the constitution and the procedural law, is of major importance. It may be decreed *ex officio* by the judge in case irreparable damage is threatened, or upon petition of the plaintiff, furnishing a bond. A counter bond may be given. If the plaintiff is successful, a final suspension is decreed. There is no equivalent of mandamus. Suspension cannot be had when the act against which the claim is made is a negative act—a refusal or omission by the responsible authority to do something.

When dealing with acts which affect personal liberty there is a strong resemblance to several aspects of habeas corpus.

Amparo is available only in the federal courts and only the federal courts have jurisdiction to declare the unconstitutionality of statutes. It is held that state judges, like administrative officials, have to apply the statute notwithstanding that article 133 of the constitution imposes on them the obligation to prefer the constitution over their own state laws.

The complaint must set forth, *inter alia*, the act against which the action is brought, the precepts of the constitution deemed violated and the manner in which the violation occurs. The action calls for a return or report by the defendant authority, and then a hearing

¹¹⁵ Illegality (*ilegalidad*) generally means contrary to a statutory precept.

(analogous to a trial, in which evidence is offered) is had. The statute calls for the hearing within 30 days, but in practice it is delayed for many months or a year.

Under the earlier decisions, *amparo* did not lie against a statute but only against its application. Later it was held that a self-executing statute could be directly attacked—one that makes illegal what was previously legal or one that changes legal status. Decisions of the Supreme Court have not been consistent as to what constitutes self-executing legislation. The controversy has lost much of its importance since the 1950 amendments. *Amparo* can now be brought against an unconstitutional law either within 30 days of its promulgation or within 15 days of its first application. In case of direct attack on a statute, the defendant is the Congress.

The first Organic Law of *Amparo* was in 1861. The present law, with amendments, is that of 1936. The 1917 constitution includes as a safeguard many procedural requirements that might have been left to the statute. The procedural statutes have become progressively more complicated; more and more instances have been added as to when *amparo* does not lie. It ill befits a New York practitioner to complain of the intricacies of procedure elsewhere, but it does seem to me that unnecessary complications, in contrast to the original simple procedure, have grown up.

A great many state and federal laws have been declared unconstitutional in whole or in part.

Amparo does not lie against violations of a contract by a government organ, save in exceptional cases (they are not "acts of authority," a requisite for the action), against violation of political, e.g. electoral, rights (these are not "individual guarantees"), against extradition, nor against expulsion by the President of "pernicious foreigners."

Mexican writers are justly proud of the *amparo*, but a few of them tend to exaggerate its virtues, vaunting its superiority over other systems. Their enthusiastic eulogiums are set off by the defects they themselves point out. The majority of writers are more judicious.

Oil company lawyers may be pardoned for being skeptical. It was held that suspension or *amparo* did not lie against the decrees of expropriation, because the general interest was involved, or against the oil legislation since oil is one of the principal sources of public wealth and the damage to society and the State, if the legislation were suspended, would be patent.¹¹⁶ In general, *amparo* does not lie against expropriations for "social benefit." Expropriation of the oil companies was unanimously acclaimed by public opinion and is still considered

¹¹⁶ Leon Orantes, *op. cit. supra* note 112 at 376-381.

a landmark to be celebrated annually. We may well bear in mind Mr. Dooley's saying that our Supreme Court follows the election returns.

One defect is that the courts are overburdened with *amparo* cases. At the end of November, 1950, there were 37,891 *amparo* cases pending before the Supreme Court. To relieve the pressure five circuit courts were organized. The pressure has been relieved, but Burgoa and others think the new system has on the whole done as much harm as good.

As of November 30, 1959, there was still a backlog of 9,264 *amparo* cases in the Supreme Court. The great defect of *amparo* (resulting in this burden) seems to be what was hailed as its virtue, namely, that the decision is binding only in the concrete case. Except as to that particular case, the executive authorities are not bound by the doctrines laid down by the Supreme Court.¹¹⁷

Amparo has been adopted by all the Central American countries. Nowhere does it seem to have been as effective as in Mexico.

Amparo was introduced in the constitutions (and continued in later ones) in Guatemala in 1879, El Salvador in 1886,¹¹⁸ Honduras in 1894,¹¹⁹ The Central American Federation in 1898, and 1921, in Nicaragua in 1911,¹²⁰ Panama, in a limited form, in 1941,¹²¹ and Costa Rica in 1949.¹²²

In general, the Mexican system is followed, but judicial decisions are excluded. In El Salvador, differing from the Mexican rule, it lies against individuals also. In that country most of the *amparo* proceedings have been to protect property rights and against arbitrary acts of the mayors (*alcaldes*). A few have been tax cases.

In Guatemala, the Supreme Court has original jurisdiction. Under the new constitution of 1956, it held that until a new implementing statute was enacted, it would not pass in *amparo* proceed-

¹¹⁷ Informe rendido a la Corte Suprema de Justicia por su Presidente año de 1959; Segunda Sala p. 6.

¹¹⁸ Arts. 37, 102; 1939, art. 57; 1950, arts. 89(1), 222. Decree No. 7 of Oct. 4, 1950, a brief statute of 26 articles in contrast with the lengthy Mexican statute, amended the 1886 law. The Judiciary Law (Decree 1136 of Sept. 3, 1952) includes among the attributes of the Supreme Court final decision of *amparo* suits.

¹¹⁹ Art. 29; 1906, art. 28; and the Constitutional Law of Amparo of the same year; constitution of 1924, arts. 29, 135; 1936, art. 33; 1957, arts. 67, 232(7). A "constitutional law" in Latin America is one that implements a provision of the constitution and that requires special procedure or a special majority for amendment, in contrast to ordinary laws.

¹²⁰ Arts. 63, 124; 1939, arts. 119, 256(11); 1950, arts. 229, 323; the Constitutional Law of Amparo was published in La Gaceta No. 27 of Feb. 8, 1951.

¹²¹ Art. 189; Moscote, El Derecho Constitucional Panameno, 464 seq. (1943); 1946, art. 51.

¹²² Art. 48.

ings on the constitutionality of legislation.¹²³ In 1956, there were eleven *amparo* petitions; all were denied. In 1957, of about forty petitions, all were denied except three, illegal arrest of prostitutes and denials of passports to non-communists leaving the country after March 1, 1956.¹²⁴

Of far greater importance and interest, however, than the Central American precedents are the recent developments in the Argentine Republic. Several of the later provincial constitutions include a limited form of *amparo* analogous to our writ of prohibition and others utilize habeas corpus to protect all individual liberties and rights.¹²⁵

In two cases, *Siri*¹²⁶ and *Kot*,¹²⁷ the Supreme Court granted *amparo*, expressly overruling prior decisions. Siri's newspaper had been closed down, without any order of a competent authority and without statement of a justified motive. This the court held was a violation of the constitutional freedoms of the press and of industry, and said, at p. 463:

This direct proof is sufficient for the constitutional guarantee invoked to be reestablished in its full integrity by the judges, and it is of no avail to allege contrary thereto the non-existence of a law which regulates it. Individual guarantees exist and protect individuals by the sole fact of being consecrated by the Constitution and independently of regulatory laws, which are required solely to establish 'in what cases and with what justification may entry and occupation be proceeded with' as said in article 18 of the Constitution about one of them . . . In consideration of the character and hierarchy of the principles of the Fundamental Charter relating to individual rights, this Supreme Court, with its present composition and on the first opportunity to make a pronouncement on the point, departs from the doctrine traditionally declared by the court to the extent that it relegated to the course of ordinary procedures, administrative or judicial, the protection of rights not strictly comprised in habeas corpus. (Bertotto Fallos, 168:15; 169:103; and later decisions). The constitutional precepts as well as the institutional experience of the country jointly demand the full enjoyment and exercise of individual guarantees

¹²³ Zelayo Coronado v. El Congreso de la República, Nov. 22, 1957, 80 Gaceta de los Tribunales 100 (an unsuccessful attempt to challenge the designation by Congress of a successor to the assassinated President Castilla Armas and calling for elections for a later date than that provided by the constitution).

¹²⁴ Vázquez v. Procurador General, 80 Gaceta 82; García Montenegro v. Ministro de Gobernación, 80 Gaceta 88; Castaneda Paz v. Presidente de la República, 80 Gaceta 90.

¹²⁵ Dana Montañó, "El Estado de Derecho." La Ley, Dec. 22, 1955 (quoting the texts in full) and see Amadeo, 169 *et. seq.*

¹²⁶ Siri, Dec. 27, 1957; 239 Fallos 459 (strong dissenting opinion).

¹²⁷ S.R.L. Samuel Kot, Sept. 5, 1958; 241 Fallos 291 (with dissenting opinions).

for the effective vigor of the State of Law¹²⁸ and impose the duty on the Judges to assure them . . . The record is returned to the court below to serve notice on the police authorities to desist from the restrictions, etc.

In the *Kot* case, the order of *amparo* was directed not against a public officer, but against private individuals, in a labor conflict, to prevent irreparable damage. In this it differs markedly from the Mexican *amparo*.

Few cases have given rise to such discussion in the law journals.¹²⁹

Innumerable applications to the courts for *amparo* have resulted from these decisions. The apparent tendency of the Supreme Court to restrict the scope of *amparo*,¹³⁰ is probably influenced by the desire not to burden the courts unduly. Whether they have had in mind the experience of Brazil and Mexico, I cannot guess.

The chief controversy seems to be between those who believe the courts have inherent equitable powers or must look to statutory implementation of constitutional provisions before they can act. In many Latin American countries, as is evident throughout the course of this paper, the latter view prevails.

*Panama*¹³¹

Prior to 1941, there was no effective remedy against unconstitutional laws. The Supreme Court in 1935 said:¹³²

There is not ascribed to this Court, and naturally not to the lower court, expressly or impliedly, the attribute of deciding with the character of generality, whether a law . . . is constitutional or not. The direct action to obtain from the judicial power a declaration of general obligatory effects in respect of whether a law or legal disposition is contrary to the Constitution and therefore without force to compel its performance does not exist in Panama. Neither the Constitution nor the statutes enacted in development of its principles, furnish any authority for so doing . . . judicial authorities lack any faculty to deny compliance with a statute or

¹²⁸ Latin American jurists do not speak of the "Rule of Law," but of the State of Law, derived from the German concept of *Rechtsstaat*.

¹²⁹ E.g. Fiorini: "El Recurso de Amparo," La Ley, Mar. 31, 1959; Bielsa: "Los recursos judiciales," La Ley, May 21, 1959; Torres: "Amparo," La Ley, Aug. 12, 1959; all with copious references to other works and articles.

¹³⁰ E.g. Gallardo, Dec. 10, 1958; 242 Fallos 434; Buosi, June 18, 1959, La Ley Dec. 30, 1959, 2 (will not lie to protect lessee against landlord shutting off his water supply) and cases therein cited.

¹³¹ Goytia, Victor F.: *Bases y Doctrina de Derecho Publico*, 2 v. Panama 1948. Moscote: El Derecho Constitucional Panameno. Panama, 1943.

¹³² National Fire Ins. Co. of Hartford v. The Nation, quoted in Moscote, *op. cit. supra* note 121 at 457, n. 10.

to authorize non-compliance, vitiating it as unconstitutional if its precepts are not clearly repugnant to the rules of the fundamental charter. This is so because otherwise the courts of justice would become censors of the activities of the Assembly and of the Executive Power in reference to the necessary formalities for the enactment of statutes, a task completely extraneous to the functions entrusted to it. To do so would be to usurp jurisdiction.

The 1941 constitution (influenced by the Cuban constitution) contains several remedies: habeas corpus (art. 28); *amparo* (art. 189); the reestablishment of legality when violated by officials (art. 190); and most important, the guardianship of the constitution by the Supreme Court (art. 188) taken from the Colombian 1910 formula, but adding:

Every officer charged with the duty of imparting justice who when about to decide any cause whatsoever considers that the applicable statute or regulatory provision is unconstitutional, shall before rendering a decision consult the Supreme Court of Justice which shall decide whether or not the provision is constitutional. The decisions of the Supreme Court of Justice in exercise of the faculties conferred by this article are final and definitive and shall be published in the Official Gazette.

This addition, Panama courts and writers believe, make it superior to the Colombian formula. The power granted by the article, it is said, is so general that it includes political, administrative, social and economic matters.¹³³

The former 1941 article is substantially embodied in articles 165 and 167 of the present constitution (1946).

A great many petitions for unconstitutionality have been successful. Among others, unequal tax laws, racial discrimination, limitations on inheritance imposed by the Civil Code, article 656 and other articles on intestate succession, and limiting options to four years, several articles of the Election Laws, an article of the Common Law marriage statute, a law authorizing occupation of uncultivated private lands, have been declared unconstitutional.¹³⁴ Fifteen cases claiming unconstitutionality were before the court between October 1956 and October 1957. Constitutionality was upheld in ten cases, including the immigration statute, Law 54 of 1938, barring the immigration of Asiatics. In five cases, the challenged statute, decree or resolution was held unconstitutional, including a statutory wharfage tax, on the ground it had not been included in the budget.¹³⁵

¹³³ Moscote, *op. cit. supra* note 121 at 463.

¹³⁴ Goytia, *op. cit. supra* note 131 at 62, 63, 113, 128, 135, 176, 185, 287; 2 Anuario de Derecho, 371, 373 (1957).

¹³⁵ 3 Anuario de Derecho, *op. cit. supra* note 134 at 281-284 (1958). From 1946

*Peru*¹³⁶

Peru shares with the Dominican Republic and with Ecuador the distinction of not recognizing judicial review. Quimper as long ago as 1857 had advocated it and it has of recent years been proposed by several writers,¹³⁷ including the President of the Supreme Court.¹³⁸ The first professor of constitutional law in Peru (1864) was a Frenchman, Pradier Fodéré.¹³⁹

The guardianship of the constitution is left to Congress (1933, arts. 26, 123). It is true the Civil Code¹⁴⁰ instructs judges to give preference to the constitution over statutes, but I have found no instance in the reports of the application of this provision. It has been suggested that the Code contemplated future constitutional amendment and does not authorize a declaration of unconstitutionality.

The "popular action" authorized by article 133 of the constitution against unconstitutional decrees of the President has not come into use.¹⁴¹ The Address of the President of the Supreme Court explains why.¹⁴²

Based on this precept, three petitions were presented to the Supreme Court in 1947 and 1948 praying that three supreme decrees issued by the then Executive Power be declared unconstitutional . . . In all these cases the Full Court declared that the exercise of the faculty granted to the Judicial Power by article 133 of the Constitution was not available, since the relative procedural statute, referred to by said article, had not been enacted.

The aforesaid article of the constitution establishes expressly and positively the authority of the Judicial Power to declare the unconstitutionality of acts of the Executive Power and its jurisdic-

to October 1956, 235 cases claiming unconstitutionality were before the court, many unpublished. A substantial number were successful. 2 *id.* 329-340 (1957).

¹³⁶ Olivo, Juan F.: *Constituciones Políticas del Peru 1821-1919*. Lima, 1922. Palomino Arana: *Reportorio de la Jurisprudencia Peruana*. Lima, 1944. Quimper, J.M.: *Derecho Político General*. Lima, 1857, vol. 2, 330, 331. Pareja Paz Soldan, Jose: (1) *Comentarios a la Constitución Nacional*. Lima 1939; (2) *Las Constituciones del Peru*. Madrid 1954. Stuart: *The Governmental System of Peru*. Washington 1925, Villaran, Luis F.: *La Constitución Peruana Comentada*, Lima, 1899.

¹³⁷ E.g. Ferrero, Raul: *Derecho Constitucional* (Lima, 1956) 179.

¹³⁸ "La Visita del Presidente de la Corte Suprema de los Estados Unidos." *Revista del Foro* (Lima) No. Extraordinario 1954, 38 at 63, 64.

¹³⁹ Several of his books were published in Lima, translated by Manuel A. Fuentes. I surmise his influence has persisted.

¹⁴⁰ The former Civil Code, prel. tit. art. VIII provided "The judges may not fail to apply the laws nor render judgment except according to the provisions thereof.

¹⁴¹ Nor, as far as constitutionality is concerned, has the extension given to habeas corpus by art. 69 of the constitution of 1933: "All the individual and social rights give rise to the action of habeas corpus."

¹⁴² 51 *Anales Judiciales* 369, 381, 382 (1955-1956). And see 52 A.J. 296-301.

tion to take cognizance of them; the exercise of this jurisdiction is only in suspense until a statute determines the procedure. This shows that it is advisable for Parliament to enact the appropriate statutory solution, so that if similar petitions are presented, the Judicial Power will not be prevented from taking cognizance of them.

This situation is clear and definite. But it is appropriate to ask what is the faculty of the Judicial Power in relation to the acts of the Legislative Power itself. Does it have power to declare the unconstitutionality of statutes? The exercise of the attributes of the Public Powers cannot be based on the opinion of jurists or on doctrines abroad, abundant and contradictory, which provide for the case, but only on positive constitutional law, the basis of Public Internal Law and of all the rights of citizens. Therefore the Political Constitution by means of provisions incorporated in its articles creates and organizes them, determining their attributes and fixing the relation and interdependence of some in respect of others and thus avoids a conflict between them which might gravely affect the life of the State. And in no part of our Constitution is there any article as to the point in question.

It is for the Congress to provide the proper solution. Its attributes and wisdom will determine whether it will grant to the Judicial Power, and in what amplitude, a function of such significance and at the same time it will enact the procedural rules for its exercise. And the Judicial Power, for its part, will fulfill the mission assigned to it, with the same serenity and firmness with which it intervenes in all the acts of its functional life.

*Uruguay*¹⁴³

Twentieth Century Uruguay is distinguished by its adherence to democracy, its innovations in constitutional law and government, and the establishment of the first welfare state in Latin America. It was a latecomer in adopting judicial review. The early constitutions left the guardianship of the constitution to Congress. Whether to continue this system or adopt judicial review was the subject of debate in the convention that prepared the 1934 constitution. A compromise formula was arrived at in an attempt to safeguard the traditional view of the sovereignty and supremacy of Parliament and reconcile it with judicial control, by making a court decision applicable only to the particular case, leaving the statute unimpaired and in full force otherwise.

¹⁴³ Boraffio, Eugenio V. & Zerbino Cavajani, Jorge: *La Inconstitucionalidad de las Leyes en la Jurisprudencia Nacional*. Montevideo, 1941 (reprint from "La Justicia Uruguaya" 1941); Gros Espiell, Hector: *Las Constituciones del Uruguay*. Madrid, 1950 (bibliog. footnotes). Macedo, case note, 55 *Revista de Derecho Jurisprudencia y Administración* 157-208 (1957) (hereinafter cited Rev. D.J.A.), a full discussion of the doctrine of judicial review. Martins, Hugo & Gros Espiell: *Constitucion Uruguaya Anotada*. Montevideo, 1956 (bibliog. 335-344). Morey Otero, Sebastian: *Constitucion Anotada de la Republica Oriental del Uruguay*. 3d ed. Montevideo, 1936.

A residuum of the power of the Legislature was left in article 75:

It is the province of the General Assembly . . . (20) To interpret the Constitution, without prejudice to the power of the Supreme Court in accordance with articles 229 to 232.¹⁴⁴

Articles 229 to 232 followed the Chilean system with some modifications:

229. Laws may be declared unconstitutional by reason of their form or contents, in accordance with what is established in the following articles.

230. Said declaration and the inapplicability of the provisions affected by it must be solicited by the interested party. The judge or court that has cognizance of the case may also *ex officio* raise the question of unconstitutionality before rendering a decision.

231. After the petition is presented or the unconstitutionality of a law is raised *ex officio* in a concrete case, the suit shall remain in abeyance and the proceedings shall be brought to the Supreme Court of Justice, to which belong the jurisdiction and the original and exclusive solution of the case, with the requirements for final judgments.

The decision of the Supreme Court of Justice shall have effect only in the controversial case in which it is pronounced.

232. The law shall regulate the relevant procedure.

The Supreme Court held in 1936 that it could pass on constitutionality without awaiting the enactment of a regulatory statute. This was expressly enacted in a wise provision of the constitutions of 1942 (art. 282) and of 1952 (art. 332), which could well be copied elsewhere, viz:

The precepts of the present Constitution which recognize individual rights as well as those that attribute faculties to or impose duties on public authorities, shall not fail to be applied for lack of the respective regulations, but such lack shall be supplied by resort to the foundations of analogous statutes, to the general principles of law and to generally accepted doctrines.

Under the 1934 constitution, the issue only reached the Supreme Court by obligatory reference to it from the lower courts. The 1952 constitution (art. 258) permits a direct action for the declaration of unconstitutionality to be brought in the Supreme Court.

The cases have dealt chiefly with alleged violations of property rights, including the first decision in 1936 which held that an expropriation law of 1927 fixing a maximum price per hectare did not meet the constitutional requirement of "fair compensation." Only the

¹⁴⁴ And the Legislature has power to declare acts of the local provincial bodies to be unconstitutional (Constitution 1934, art. 261; 1952, art. 303. See note 55 Rev. D.J.A. 125 (1951)).

courts, in case of controversy, can finally decide the value. (A dissenting opinion was to the effect that the Legislature is competent to fix the *quantum*). Several other cases have upheld the requirement as to fair compensation.¹⁴⁵ The constitutionality of a moratorium on debts was upheld, but a provision in the law for reduction of the interest rates stipulated in the contracts was invalid.¹⁴⁶

*Venezuela*¹⁴⁷

Limited powers of judicial review were first given in the constitution of 1858, and in full in 1893. The 1945 and 1947 constitutions provide that the High Court shall declare the nullity of the acts of the national and state legislatures, municipal councils, of the Executive Power of the Nation or of the states and of the Governors of the Federal District or Federal Territories which violate the constitution. This provision was substantially reenacted in the 1953 constitution (art. 133), which divided the High Court into two courts: one the Federal Court, the other the Court of Cassation.

The Organic Law of the High Court, August 22, 1945, provided for notice to the Attorney General (art. 45) and in constitutional cases, the full court sat, with seven sufficient to constitute a quorum, but in no case could a decision be rendered by a majority of less than six (art. 4). Under the Organic Law of the Federal Court, August 22, 1953, decision must be rendered by at least three votes (art. 5).

Among decisions declaring unconstitutionality have been those invalidating laws restricting the autonomy of the municipalities; enlarging or altering the constitutional precepts as to nationality; granting monopolies on old established industries and commerce, as infringing the freedom of work, commerce and interest (such grant can be made only as to new discoveries and new industries); and municipal prohibitions on the export of products or fixing prices. One law confiscating the property of the deceased dictator Gómez was held unconstitutional; others were upheld.

Since the electoral body does not constitute a Public Power in the sense of the constitution, the Supreme Court exercises no juris-

¹⁴⁵ But in *Ferrari v. Fisco* (1938), a legislative authorization to the Jockey Club to sell race tickets was held not to constitute a vested right; the Legislature could revoke it. Boraffio, *op. cit. supra* note 143 at 16.

¹⁴⁶ Boraffio, *Id.* at 10-31.

¹⁴⁷ "Feuille: Federal Supreme Court of Venezuela," 5 Texas L. Rev. 41 (1926); Loreto, Luis, "El control jurisdiccional de la constitucionalidad de las leyes," 41 Revista de Derecho y Legislación (Caracas, 1952) 80; Ruggeri Parra, and La Supremacía de la Constitución y su Defensa. Jurisprudencia del Alto Tribunal Venezolano (1870-1940). Caracas, 1941; Sequera, Carlos: El Control Jurisdiccional de la Constitucionalidad Intrínseca de las Leyes. (Caracas, 1939).

diction over elections. The court upheld the constitutionality of an article of the Education Law (later embodied in the Labor Law) obligating certain employers to maintain schools for their laborers and for the children of laborers. The court has also passed on questions involving freedom of teaching with somewhat inconsistent decisions as to the extent of the State's right to regulate. The constitutional guaranty of equality of taxation does not inhibit the national legislature, but only the states and municipalities, from granting exemptions from taxation. Civilians have been held subject to military tribunals for ordinary crimes only when acting as accomplices to military crimes. The constitutional provision against retroactive laws extends to laws of public order or policy (in our phraseology, it controls the police power).

EFFECT OF DECLARATION OF UNCONSTITUTIONALITY

In the United States, the original theory was that a declaration of unconstitutionality applies only to the specific case. The law is held to be null and void *ab initio*. Of course, although the statute theoretically remains on the books, it is in fact dead.

Our original theory is followed in Argentina, formerly in Brazil, as a result of our decisions, and in Bolivia, Chile, Guatemala, Mexico and Uruguay by virtue of the wording of the constitutional provisions. The decision is *inter partes*, not *erga omnes*.¹⁴⁸

Under the popular or public action by any citizen or group of citizens, the practical effect is the repeal of the statute, but without retroactive effect, in Colombia, Cuba, Panama, and *semble* El Salvador.¹⁴⁹

The Colombian viewpoint is shown by the reasoning of the Supreme Court:

If (the judgments) had a retroactive effect and were to annul laws *ab initio*, there would be no right that was stable and social insecurity, alarm and anxiety would be permanent and increase daily.¹⁵⁰

Reasons of public policy require that unenforceability pro-

¹⁴⁸ Arg., Ghigliani 92-103, Casiella 130, Hronrich-Novarro 112; Brazil, Wald 137-138; Guat., Grant, 3 Am. J. Comp. L. 186-190 (1954); Chile, Carvajal Ravest 152; Mexico, Tena, 432, 433, 467, 481-483; Burgoa 222-225; Leon Orantes, 26; Uru., Macedo 187; and 1952 constitution, art. 259; Bolivia, Trigo 683, 684.

¹⁴⁹ Pan., Goytia IX; S.C. Nov. 21, 1947, Goytia Nos. 85, 86, pp. 110, 113. El Salv., Aguirre Cardona, La Historia Constitucional de el Salvador, 163 *seq.* (1954). Some of the Argentine provincial constitutions state that a declaration of unconstitutionality of a local statute by provincial Supreme Court causes the law to lapse, *e.g.* Chaco, art. 9, *amparo* Melamed S.T. Resistencia, March 3, 1959; La Ley, Mar. 9, 1960, 5. Dana Montañón, note 17 *supra*.

¹⁵⁰ 5 Orozco Ochoa: Jurisprudencia de la Corte Suprema de Justicia No. 4260.

duce no effects as to the past . . . it is undeniable that there would be (social insecurity) since all citizens in their transactions and operations must go by the law which is in force for such affairs and proceed in accordance with that law. So that if a judgment of unenforceability of that law were to disregard the effects it had produced, the legal relations of the parties interested in the acts and contracts would lack any stability whatsoever.¹⁵¹

In Cuba under the 1901 constitution, the effect was only as to the specific case, the law remaining in full force and effect. By a law of March 17, 1922, a declaration of unconstitutionality of a statute or decree in more than two cases obligated the authority which had issued it to repeal or amend it within twenty days after publication in the Official Gazette. If no action was taken, the impugned provision lost all efficacy and ceased to be obligatory. This was changed by Constitutional Law of 1934 (art. 78(5)): upon a single declaration by the Supreme Tribunal, of the unconstitutionality of a law, etc., it cannot again be applied in any manner or under any pretext.

Distinction, however, is made between a private action and the public action. As in Colombia, a declaration in a public action has no retroactive effect; it looks only to the future. In the private action, the law is the same as ours; the unconstitutional action is null and void *ab initio*. But in both instances, the unconstitutional law is annulled for the future.¹⁵²

In Brazil, a declaration of unconstitutionality annuls the offending law and it becomes the duty of the Senate to suspend it.¹⁵³

In Venezuela when the courts in the course of their ordinary judicial decision find a law to be in conflict with the constitution, they go no further than to give preference to the constitution (Code of Civil Procedure, art. 7). The decision is solely *res judicata inter partes*. But when the issue of constitutionality is raised in the Federal Court, in a popular action, the court goes further and declares, as provided in the constitution, the nullity of the unconstitutional law or decree. In the first case, the decision has only a limited effect, between the parties in the cause; the law, apart from that specific case, continues in force. In the case of a decision by the Federal Court, under the extraordinary remedy of unconstitutionality, the law is not

¹⁵¹ Soffia G., May 29, 1933; 39 G.J. 1, 2. There may be an exception to the rule where vested rights have been violated (*Landinez de Martinez v. The Nation*, 23 Feb. 1927, 34 G.J. 126, 127). There is a trend in the United States to mitigate the rigor of the rule that unconstitutional statutes are wholly void *ab initio*. 16 C.J.S. "Constitutional Law" § 101 at 469-481 (1956); TUNC No. 255, 294-297.

¹⁵² *Infiesta*, 110 *et. seq.*; *Garceran*, 122, 123, 173, 249-250 (noting dissenting opinions) 437-474.

¹⁵³ *Jacques*, *supra* note 42, 279-280. There would seem to be no means to compel the Senate to do so. Similarly in the U.S., 16 C.J.S. "Constitutional Law" § 65 at 178 (1956).

technically repealed, but it is declared void *ab initio*. The decision as to constitutionality or unconstitutionality has a general and obligatory effect binding on all citizens and authorities. It is *res judicata inter omnes*. This has been repeatedly decided by the court.¹⁵⁴

The rule that a decision of unconstitutionality is applicable only to the specific case seems to be an unfortunate one. It certainly leads to a multiplicity of actions. Each aggrieved person has to bring an action for self-protection. The possibility of a test case is ruled out. The statute remaining in full force, except as to the particular parties, it is held in Mexico that the state courts and administrative authorities have to apply it.¹⁵⁵ The same is true in Chile and Uruguay. In one case, in the Argentine, the principle was carried to an extreme. A tax law had been declared unconstitutional and the return of the taxes that had been paid was ordered. The court rejected a later demand for the return of taxes paid after the original complaint had been filed, saying:¹⁵⁶

Although the situation of the plaintiff relative to the new quotas of the tax paid may be identical with those which existed in respect of the quotas that were the subject-matter of the suit, the unconstitutionality declared has no effect except as to the amount, return of which was the subject of the complaint and judgment.

Many aspects of the scope of judicial review must be omitted for lack of space. Habeas corpus has been extended in several countries to cover all constitutional individual guarantees and is used to test the constitutionality of legislation. The suspension of the writ and of other constitutional guarantees under martial law or a "state of siege"; *de facto* and revolutionary governments, of which there have been numerous examples: delegation of powers and the omnipotence of the Executive; the power of the courts as to constitutional amendments; their treatment of political questions, including treaties; the structure of federalism in Argentina, Brazil and Mexico, differing from our own in noteworthy particulars; all these and other topics, vitally affecting the scope and practice of judicial review, are fascinating topics for research and of the highest practical importance.¹⁵⁷

¹⁵⁴ Sequera, *supra* note 147, 11-14, 71, 108; 2 Wolf 172-177.

¹⁵⁵ Tena Ramirez (4th ed.) 489.

¹⁵⁶ Pereyra Iraola v. Prov. of B.A., S.C. Oct. 17, 1923; 139 Fallos 65.

¹⁵⁷ Among the writings in English on some of these highly controversial subjects may be mentioned: Irizarry y Puente, "Exclusion and Expulsion of Aliens in Latin America," 36 Am. J. Int'l Law 252 (1942); "International Extradition in Latin America," 28 Mich. L. Rev. 665 (1930); "De Facto Government," 30 Tul. L. Rev. 15 (1955); Tannenbaum, "The Political Dilemma in Latin America," 38 Foreign Affairs 497 (1960); Garcia Calderon, *Latin America* (1913); Baggett, "Delegation of Legislative Powers to

CONCLUSION

Our study reveals many encouraging factors to offset a melancholy picture. The ills that beset underdeveloped Latin American countries cannot be cured by a constitution however wise—the problems are far deeper—but they can be aggravated or their cure retarded by a constitution ill adapted to their historical traditions and their special needs. It may well be that some countries are not yet ripe for judicial review. New legal techniques, like modern findings in science and technology, must first develop, by a slow process of education, an appropriate milieu before they can be absorbed into the lifestream of presently backward countries. The influence of our American tradition and system may not necessarily be beneficial. Far better is it for each country to evolve its own institutions than copy foreign models. Mexico, Colombia and Brazil set an example. Judicial review can thrive only where there is a strong independent judiciary, lacking for one cause or another in many nations. Chile with its ingenious system of choosing judges from nominations made by the Supreme Court itself has the best record in this respect. In countries where the calibre of the judges is high, as in Chile and Uruguay, they might well be entrusted with broader powers than they now exercise.

Among factors that have contributed to the acceptance of the doctrine of judicial review, two may be specially noted. One is the tendency to abandon a traditional proclivity to eloquent pronouncements devoid of any practical rules to enforce the noble purposes they proclaim, by incorporating practical rules. That curious mixture or contrast in the Spanish character, typified by Don Quixote and Sancho Panza, of impractical idealism and earthy common sense, runs through all the history of Spanish America. In the written constitutions Quixote long prevailed. The other factor that is contributing to the growth of judicial review is a change of view as to the functions of the judiciary. The Montesquieu doctrine that the judge is only the mouthpiece of the law, a slot machine, the “mechanical” theory of the judicial function, is giving place to a recognition of the creative role of the judiciary.¹⁵⁸ The writings of the leading, and most controversial, Latin American legal philosopher, Carlos Cossio, have

the Executive in Mexico,” 8 So. Cal. L. Rev. 114 (1935); Dana Montañó, “The Constitutional Problem of the Argentine Republic,” 6 Am. J. Comp. Law 340 (1957); De Sa Freire Basilio, “Judicial Power as a Guarantee of Individual Rights,” Proc. Tenth Inter-Am. Bar Conf. (Buenos Aires, 1958) 205. Latin American references will be furnished on request.

¹⁵⁸ Couture, “The Nature of Judicial Process,” 25 Tul. L. Rev. 1 (1950).

contributed to lay the philosophical foundation for this change of attitude.

The scope of judicial review in effect has been severely limited in the later constitutions by their sweeping provisions as to social welfare in its broadest sense (labor relations, family, education, the exaggeration of the theory that property is a social function). The new constitutions, beginning with Mexico in 1917, contain a mass of contradictory ideas and repudiate radically the basic principles of classical constitutionalism. Individual liberty is sacrificed to vague concepts of social justice; the State may intervene in all spheres of activity, invading the home alike with all branches of work. Under the pervasive sweep of these provisions, the most outrageous legislation could find shelter. Latin America is at present undergoing violent changes; social reforms, long overdue, are under way. The growing respect for judicial review may be a factor that may help to curb excesses and, in the defense of civil rights, to transform the social system within the bounds of true democracy. It is not enough that legislation be "constitutional." The constitutions themselves must meet the requirements of the rule of law and conform to international standards of justice. Otherwise economic paralysis will set in, personal liberty vanish and what is intended to be the salvation of the masses will spell their doom. Misled by demagogues or dreamers, some nations are blithely unaware they are treading the brimstone path to moral and economic ruin.

But the dangers for democracy and for individual liberties in many Latin American countries arise not so much from an independent legislature as from an unduly strong Executive power. The main problem, and it can be solved only by education and political culture, especially in the Army, is to curb arbitrary exercise of power and to subjugate the Executive to the reign or supremacy of law. This is a task primarily for the lawyers of the hemisphere—heretofore their eloquent defense of liberty has not reached the masses, but only the élite. Judicial review is serving a useful educational function. This is perhaps its greatest contribution. In many countries, the courts have been successful in furnishing protection against arbitrary action by local officials. *Amparo* is dear to the people in Mexico and habeas corpus in Brazil, because there is a resort to a Supreme Court, independent of local influences. Should the courts ever rise to a position where they can, with equal popularity, confront the highest power of the State, much will be achieved.

Progress towards true constitutional government has been made. Much is still to be achieved. The auguries are hopeful.

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